Problems of Printing Industry in U. P. with special Reference to Allahabad

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P R E F A C E

The Second World War initiated an era of expansion in Indian economy. For the last two decades nearly the printing industry in India has been finding more scope for its development owing to the attainment of freedom by colonies like India. After emancipation they became very much interested in an all-round upliftment of their general masses and specially in the economic progress of the country through education. Throughout the world today the growth of literacy is increasing the demand for reading matter in an ever-widening degree. In India, a very poor percentage of literacy and a low standard of living have been the two main causes of the underdeveloped condition of the printing trade. However, since the attainment of independence by India, the Government of the country has taken up the task of promoting literacy among the masses with zeal and seriousness.

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Moreover, a continued rise in the volume of printed material is expected because of the expansion of education and industry and the increasing demand for printed material for dissemination of information and for packaging, advertising

and many other industrial and commercial uses. The vital role of the Indian Printing Industry along with the increasing importance can no longer be ignored. A vivid realisation of these truths has impelled me to take up " Problems of the Printing Industry in U.P. with special reference to Allahabad " as the topic for my research work.

No doubt, the subject is a vast one, but for lack of time and material I have to content myself by taking only some aspects of the industry for discussion; leaving others for an advanced research work which will follow the present study later on.

Problems have been tackled specially on the basis of field investigation and by constructive thinking. Of course, suggestions offered in this work are liable to be modified by the changing needs of the society as changes are bound to occur with the lapse of time. The world is not static. It is rather surprisingly dynamic. Everything is, at present, in a state of flux. Demands are changing and problems are changing. In this respect the subject under study has to share the common lot of many other subjects.

Notwithstanding these handicaps, there can be no denying the fact that whatever is necessary for the progress and development of this industry should be taken up without any loss of time. The present study attempts only to show the direction and leaves much for future investigations. The need of the hour is to develop the industry by all means as it is one of the leading industries of the world.

I thank the managers of the various presses and others for their kind help they gave me in the collection of the data presented in this volume.

I would be failing in my duty if I did not express my gratitude to Dr. P. R. Das Gupta, S.S.O. of Central Drug Research Institute, Lucknow, without whose constant advice this work could not have been completed.

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Uma Bose

(Uma Bose)

ALLAHABAD

30th January, 1964.

C O N T E N T S

CHAPTER PAGES

PART - II

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P A R T - I

C H A P T E R I

PRINTING THROUGH THE AGES

A - Five Hundred Years of Printing

B - Methods of Printing

C - Printing Occupation

A - FIVE HUNDRED YEARS OF PRINTING

The romance of the communication of human thought through the medium of printing was not just a divine flash of genius, but a history of sustained effort on the part of pioneers in the field. The idea of reducing thoughts in print was ushered in after considerable experimentation and perfection of technique, before the modern highly mechanised system was finally evolved. The manner in which the modern press works can never give to the uninitiated even a scant perspective of how the present art of printing has come to acquire such a fine perfection.

Oral communication of human thought is all that formed the main vehicle for the conveyance of propositions, concepts, premises or philosophies of subtle thought, processes and delicate distinctions of argument. The transformation of thoughts orally, expressed in print with the perfection of the technique of press, was a significant epoch-making event, through which a single idea could be conveyed to millions of human beings. Though the impact of the spoken word was inspiring and prompt, and still

continues to be so, yet the message of the written word, through print, has unique advantages.

Devoid of the hypnotic spell of the spoken word over its listeners, the written word is permanent and can be referred to again and again, unlike its counterpart, whose impressions are bound to last only temporarily, and finally get lost in the backwaters of human memory. The spoken word would easily sway the listeners to the conclusions offered, but the written word is bound to the hypothesis from which it has emanated. In other words, the reader of the printed text can always refer back to the hypothesis on which the whole argument is built and dispassionately assess its soundness. The spoken speech imposes a conviction over its listeners, but the written text must bear true to the reasoning and understanding of its reader.

Secondly, the conclusions of spoken words cannot be gauged until the final argument is advanced and has to be taken for granted without a fuss. On the other hand, the written text can give its reader a scope for anticipating the conclusion, by just turning to its end. The reader must digest the message of the written text before being convinced of hypothesis, but the listener of the spoken speech must, or is prone to, swallow conclusions.

Finally, the reader of a printed text can pause at will to ponder over the idea conveyed, meditate, verify and weigh the argument advanced. He can even resort to a dictionary for a fuller understanding of the written

word. The listener of the spoken word must take unwittingly the slant of the views of the speaker. With a proper grasp of the colour of the written words, a reader can even derive the thrill, pleasure,and even sway in the emotion which the listener of the spoken word enjoys . But, in any case, the spoken word can never lose the importance and significance, which singularly is its treasured quality.

The growth and perfection of subtle thought processes,including the growth and settlement of social sciences, received a signal impetus towards advancement, when once the art of printing for the first time began taking shape. Thoughts and propositions in general as well as those political, constitutional, ecclesiastical and even the vast strides which the various literary, sociological, philosophical and scientific movements have taken during the recent times, owe much of their perfection and stature to the art of printing. Printing has made sterling contributions to the economic growth, and ultimately to the industrial advancement and well-being of nations the world over. Darwin's premise on the evolution of man, Newton's concept of the physical laws, or the literary contributions of Shakespeare, Milton or Bacon, or even the classics of Homer, might have remained unknown to man today but for the perfection of the art of printing. The art of printing,taking definite shape as we know of it today, makes an era in which nations were born and grew and enabled humanity to progress

and helped in acquiring the modern perfection and awareness of the vast storehouse of knowledge.

The perfection of the art of printing is not a distinct and separate process. It has been closely associated with the advancement of scientific and technological skill, application of science to our every day problems and the outcome of involved experimentation and research. The perfection of the art of printing, coupled with the improvement in its style, and closely linked up with technological improvements, is also the outcome of commercial and industrial needs, and lastly even due to change in tastes and sociological interests.

The modern concept of printing can be traced back to the " epoch-making invention " of Guttenberg in 1439, which he described as an " adventure and art "; yet for the purpose of our critical study of the movements relating to the evolution of the art of printing, the following may be considered as convenient historical divisions. When we talk of modern printing, we necessarily import the idea of printing with movable types, and the periods for our study may be divided thus :

1) 1450 - 1550, the INCUNABULA period or the Creative century or the epock-making ten hundred year span, which ushered in practically all the modern features which characterise modern printing ;

2) 1550 - 1800, The Era of Consolidation, characterising the development and perfection of the achieve-

ments in the preceding period with a measure of conservatism; and

3) 1800 onwards – The Era of Modernism : During this period, printing underwent significant improvements, becoming highly mechanised and perfect. In this period we find the vast changes in the methods of production and distribution and as well as in the habits of producers and readers.

<u>The INCUNABULA Period (The Creative Century) – 1450 – 1550</u> :

The word " Incunabula " has been used in various shades of meaning; either being confined to the time from Guttenberg's first production (1439) to December 31, 1500 or to denote the period from Guttenberg to 1500 as ' prima typographiae incunabula ', when, as described by Bernard von Mallinckrodt, Dean of Munster Cathedral, in a tract (De ortu et progressu artis typographicae – Cologne, 1639), " typography was in its swaddling clothes ".

The word ' incunabula ' was quoted as being equivalent to " period of early printing to 1500 ", by the French Jesuit, Phillippe Labbe, in his 'Nova bibliotheca librorum manuscriptorum '(1653).

In the eighteenth century, when emphasis on the understanding of Latin had declined, people used the term ' incunabula ' to denote the books printed during this period. Much later, in the nineteenth century when Latin was almost out of vogue and there were very few writers in the language, several words like ' Inkunabel ',

' Incunable ', ' Incunabulum ' were coined referring to individual items that emerged from the printing presses of the fifteenth century.

The dateline set at the end of the fifteenth century from Guttenbergs' time, was hardly representative, for beyond it was the period which saw several masters of modern printing, such as Anton Koberger (1450 - 1513), Aldus Manutius (1460 - 1515), Anthoine Verard (d. 1512), Johannes Froben (1460 - 1527), Henri Estienne (1460 - 1520), and Geofroy Tory (1480 - 1533).

The artificial barrier created by treating the ' incunabula period ' as something distinct from the first half of the sixteenth century, tended to produce disregard for the contributions of the early sixteenth century. Moreover, it gave an under-estimated impression of the work done in the progress of modern printing during the first half of the sixteenth century. The artificial separation of the two periods into halves of a single century of continual progress in the art of printing, also gave the impression that the two divisions were distinct periods of work and contributed new ideas of printing. This apparent effect was neither true nor even convenient or advantageous for the purpose of comprehending the evolution of the early contributions to the art of printing.

The only difference which lay between the latter half of the fifteenth century and the first half of the sixteenth century, was in respect of the functions of the typefounder, printer, publisher, editor and bookseller,

which were and could be concentrated in one man or a single firm in that business. All the various aspects of the art of printing could be conveniently and without objection concentrated in one institution or individual. The distinction, if any, was not recognised or had not been fairly and clearly established.

As time passed, by about 1540, the various aspects of the printing trade had separated out and had acquired appreciable stature to be reckoned as distinct and specialised branches of printing. Printing, publishing and bookselling were established industries, which earlier could be managed with by a small capital and by a single individual. But now, it requires a fair amount of capital, foresight not of a single person but of a group of people in the different branches of the trade.

While Robert Estienne (d. 1559) ushered in the " era of the great printer-scholars ", Claude Garamond of Paris (d. 1561) and Jacob Sabon of Lyons (from 1571 Frankfurt), were the pioneers to practice type-designing, punch-cutting and type-founding as distinct and separate branches of the art of printing. By about 1540, the era of Guttenberg, the idea had taken definite shape.

The revolutionising decentralisation of the various branches of the printing trade, evoked many a protest, and even as in Germany, the German Diet of 1570 proposed a state check to the bifurcation. It wanted, in vain, to prescribe that printing presses be confined to the " capital of

princely states, university towns and the larger imperial cities ", and ordered the suppression of all other printing establishments. Near about this time, tho printing trade had got concentrated to Paris, Lyons and Geneva in France; to Venice, Rome and Florence in Italy, and to Amsterdam, Leiden Antwerp and at other places in Europe.

The first half of the sixteenth century still constituted the " incunabula period " - the creative era with vast contributions to the printing art, namely, the various type designs and forms. Though the italics of Antonio Blado and the roman letters of Claude Garamond, created and introduced about the year 1540, had gained fair acceptance, yet they were so much in vogue, that the " excellent cursive gothic " characters of the letters introduced in Hamburg in 1550, received a cold reception. The outcome of this conflict and the orthodox instinct of the printers during that time, prevented variety being imparted to the gothic character of the letters. The ' Latin ' faces with their ' Roman ' and ' Italic ' counterparts continued to enjoy a patronage exclusively their own.

Towards the mid-sixteenth century, when even the location of printing trade in Europe, transformed from its concentration at a few places, to others spread, out widely over the continent, the scope of the printing and publishing trade widened and it was about this time that Christophe Plantin, a Frenchman, laid the foundations of the Netherlands book production - a golden step for the expansion of the trade. Even in far-off England, a charter was granted to

the Stationer's Company in London, in 1557 - marking the step as one of " unfettered expansion of the printing trade ".

Guttenberg -

Guttenberg, who is sometimes referred to as the father of modern printing, made his achievements at a time when there were several others in the field, working on similar projects. Moreover, the information pieced together is either fragmentary or insufficient to reveal fully the steps which led to the invention of printing with movable types cast from matrices.

Johann Gensfleisch zum Guttenberg, was born sometime between the years 1394 and 1399 in a goldsmith's family. While in political exile at Strasbourg round the year 1440, he began his experiments in printing work. At that time there were others too, mainly goldsmiths, who were working on the same project in various places, notably at Avignon, Bruges and Bologna. The experimenters at these places were trying to discover what was termed as a method of producing an " artificial script ", printing popularly so called during that time. Their trend, therefore, was most suitable for Guttenberg for pursuing his object.

Guttenberg returned to Mainz sometime between the years 1444 and 1448 and by the close of that decade (1450) had completed his researches in that field making his invention of printing with movable types cast from matrices

perfect enough to be employed commercially. Towards this end, Gutternberg had managed to secure the services of about 800 guilders from the Mainz lawyer, Johannes Fust. Another two years later, in 1452, Johannes Fust made available to Guttenberg another 800 guilders coupled with the arrangement of a partnership for himself in the business - " production of books " - a specialised branch, though infant, industry.

Guttenberg had hardly worked for another three years labouring with his invention of making the commercial application perfect, when in 1455, the Mainz lawyer, diverted his patronage to another man, namely, Peter Schoffer of Gernsheim, who was in his employment. Fortune dawned upon Peter in the commercial field of printing books, who also, later became the Mainz lawyer's main interest, by marrying his daughter with a handsome dowry.

Just about that time another printer is known to have invented some inferior types, which were employed for printing calendars, papal bulls, Latin grammars and for similar other work.

Guttenberg, on the other hand, could only manage to salvage from his misfortunes, the 42-line and 36-line which had been employed to print the Bible and the Catholicon.

The dissemination of knowledge and the economy which could be effected by suitable choice of types, were two things which Guttenberg could manage to prove with the

Catholicon coming into print in the 42-line types. The compilation of the Catholicon by Johannes Balbus of Genoa in the thirteenth century, further proved by using the types invented by Guttenberg that book production could also be cheapened by the proper selection of types.

The inclusion of the ' colophon ' in the Catholicon revealed the mind of the great inventor, for it appears to have been written by himself, which reads as follows :

" With the help of the Most High at whose will the tongues of infants become eloquent and who often reveals to the lowly what he hides from the wise, this noble book Catholicon has been printed and accomplished without the help of reed, stylus or pen but by the wondrous agreement, proportion and harmony of punches and types, in the year of the Lord's incarnation 1460, in the notable city of Mainz of the renowned German nation, which God's grace has designed to prefer and distinguish above all other nations of the earth with so lofty a genius and liberal gifts. Therefore, all praise and honour be offered to Thee, Holy Father, Son and Holy Spirit, God in three persons; and thou, Catholicon, resound the glory of the church and never cease praising the Holy Virgin. Thanks be to God "*.

Guttenberg neared his end by 1460, when he was struck blind and seems to have abandoned printing. His misfortunes increased at the sack of Mainz in 1462, but was

* Steinberg, S. H. - Five Hundred Years of Printing, p. 23. Made and Printed in Great Britain, 1955.

somewhat compensated by a pension granted to him in 1465, by the archbishop. He died in 1468, on February 3, buried in the Franciscan Church, which too was desecrated in 1742. A kind relation, later, dedicated an epitaph which read " to the immortal memory of Johannes Gensfleisch, the inventor of the art of printing, who has deserved well of every nation and language "*.

The product which paid a tribute to Guttenberg and which could be called his own creation was the printing of 42-line Bible, set up in 1452 and published before August 1456.

Guttenberg's invention was so highly perfect that very meagre improvements were added to it until the eighteenth century and, as such, Guttenberg's original design remained the last word in the technique of printing, popularly known as the " common press ". The high technical perfection which Guttenberg reached later in his work, remained unchallenged until the early nineteenth century. Details of the early experimentation of Guttenberg being obscure, the " technical efficiency " reached by him in composing, printing, matrix-fitting, type-casting and punch-cutting, remained for nearly three centuries the " last word " in the field, with the result he was the " unassailed master craftsman of his art " for long. The only contribution above that of Guttenberg came from the Dutchman, Willem Janszoon Balaeu, who gave the method of enhanced screw-and-lever press area,

*Steinberg, S. H. - Five Hundred Years of Printing, p. 23. Made and Printed in Great Britain - 1955.

and slightly increased efficiency. On the other hand, some improvement to the press by Leonardo da Vinci did not come to be tested, but remained only in the blue-print stage.

Guttenberg indeed " invented printing ",but certainly was not the first in the field of printing of books, or cannot be called to be the " inventor of the printing of books ". Books were being printed even before Guttenberg's time; it used to be done with the help of wood-blocks, engraved metal plates, drawings or pictures on stone, and other media. The printing of books ' printed ' by William Blake and photo-composition is yet another example of production of books, though not exactly by movable types which constituted the ' epoch-making ' contribution by Guttenberg, marking that era as revolutionary over the previous methods in vogue. The avenues opened by Guttenberg's invention of ' editing ', ' sub-editing ' and ' correction ' of a text of printed matter, which could automatically be made identical in every copy, or in other words, " the uniform edition pre-ceded by critical proof-reading ", was the significant superiority of his method, which it commanded over the ones in existence. The similarity of every copy of each edition, applied to misprints as well when identical " errata " slips could be added to each of the corrected texts.

Guttenberg's two main contributions to the printing world were, first, what may be called ' job-printing ', that is, the foundation of modern publicity media, possible

through the judicious use of the vast variety of letters in clever combinations, the main significance of Guttenberg's invention.

Secondly, the invention of Guttenberg made it possible to produce and place for sale a large number of identical copies without much need for time in their production. Guttenberg can rightly also be called the " progenitor of the periodical press ", when with later improvements, it became possible for the printing and production of thousands of copies of a single text or subject matter.

While Guttenberg is easily called the ' father of modern printing ', yet, it would be worthwhile to consider what constituted his invention. The attendant circumstances were largely responsible for Guttenberg to think in terms of devising some sort of method for the " large-scale production of literature ". The trend of the times, namely the accumulation of scribes who transcribed copies of wanted texts of subject matter, specially in university towns, like Paris, who sometimes even formed themselves into guilds, revealed the necessity of having some sort of quicker process by which a single text or subject matter could be multiplied into several copies. These professional scribes, though providing an answer for the multiplication of texts, were beyond the reed of the poor man, for they plid their business mostly for the richer sections of the people who desired to possess classics

as a trait of their aristocracy. Then, there was the poor student who often found it difficult to get copies of legal, theological, and literary texts, for the professional scribes who often worked under guilds, were beyond the meagre resources of their pockets. Vespasiano da Bisticci, for example, engaged as many as fifty scribes at a time in the university town of Paris, and the Brethren of the Common Life in Deventer, had so much specialised in the copy of philosophical and theological texts, that they had monopolised the market all over the northern Europe. There were others too, like Diebold Lauber who had organised a " veritable book factory " in the Alsatian town of Hagenau, and his productions mainly were meant for the open market. Lauber, on the other hand, specialised in the printing of " light reading matter ".

On the other field, the Chinese method of printing from a negative relief said to have come into being very early (594 A. D.) done by " rubbing off impressions from a wood-block " had come to be known during Guttenberg's time, where block-prints and block-books were available in the market. The Chinese system of printing had spread out to the west in Europe and prevalent during Guttenberg's time, through the media of traders traversing the vast continent along the caravan routes.

The Chinese further contributed by inventing paper, which proved much more congenial to printing than Vellum, which was in vogue, was another distinctive advancement which helped printing to acquire its modern trend. Guttenberg in

the process of his invention, replacing the wood by metal and the block by the individual letter, could be said to be only extending the precedent, already in vogue. Furthermore, as a goldsmith by profession, Guttenberg was only advancing in his own trade, that of cutting of punches for either imprinting their trade marks, or for imprinting inscriptions on cups, bells, and other metalware by punches of letters.

The availability of the winepress which had been introduced a thousand years back in his own native land by Romans, was another facility which became handy in his pursuit of compressing and flattening some moist substance which was also pliable, such as printing paper which came to be used later, for taking off impressions from it.

<u>The Era of Consolidation 1550 - 1800</u> :

The development of the printing press provides a remarkable history of achievement. Hand presses were far more than 100 years constructed of wood and operated on the screw principle. William Janszon Balaeu (1571 - 1638), of Holland made the first improvement, but no radical change came until the end of the eighteenth century. Adam Ramage, of Philadelphia and Charles, Earl of Stanhope, of London working at about the same time, made further improvements, Stanhope's press, appearing in 1800, being the first to be constructed entirely of iron. George Clymer, beginning in Philadelphia and continuing in London from

1817 to 1834, was the first to abandon the screw entirely; his substitute being a series of compound levers. The hand-lever gle-jointed bear principle, appeared about the same time and eventually superceded all others.

In 1790 , William Nicholson, an Englishman,took out a patent for a cylinder press,but this did not get beyond the drawing of plans. It was left for Frederick Koeing, a Saxon,to construct the first power-driven machine in 1811. This, however, proved but little more than the adaptation of power to the hand press,and it is assumed that only one of these machines was made and used for book printing.

The main characteristics of this period is ' the old order changeth yielding place to new '. The last two hundred and fifty years that followed the ' heroic century ' were marked with certain changes (technically, there was not much change).

The personal union of the type-founder, printer, editor, publisher and book-seller came to be buried,though their functions were sometimes still combined. The occupational differentiation came to stay. The decisive change was in the ' order of precedence ' with the publisher as the central figure. The professional author emerged as an independent force with a wider reading public,and the periodical and the newspaper press became the chief vehicle of spreading knowledge.

The Era of Modernism - 1800 Onwards :

The nineteenth century marks a decisive stage in the history of printing. That is, during the late eighteenth and the nineteenth century the demand for books rose throughout the western world as a consequence of the social and economic effects of the industrial revolution, and particularly as an aspect of the changing status of the middle class.

The prevailing conditions affected the technique of printing, the methods of publication and distribution. Three hundred and fifty years elapsed after Guttenberg's invention before any basic change was made in the technique of printing. There was no difference between the humble press on which Guttenberg printed the 42-line Bible, and the presses for the accommodation of which John Vanbrugh designed the spacious Clarendon Building in 1713. Now, within a generation, the printing trade underwent a wholesale alternation.

In 1814 a German named Frederick Koeing invented the first steam-driven press with a rotating cylinder. The machine produced 1,100 impressions per hour, thus quadrupling the output of a hand press. Later, a machine was constructed to print upon both sides of the sheets before delivery and these machines were in operation until 1827.

Koeing returned to Germany in 1817, and Applegarth and Cowper, engineers of The Times, built a machine in 1827 for printing on both sides of sheet, and capable of giving

4,000 impressions an hour. This was in use until 1848 when Applegarth invented a new type of machine with cylinders in a vertical position and on which the type was secured by means of wedge-shaped column rules. Around the type cylinder were grouped eight impression cylinders, the sheets being delivered in a vertical position and taken off by hand. The output of this machine was 8,000 impressions per hour. There was only one of these machines made and it was ultimately replaced by the Hoe type revolving machine, which made way for the Walter rotary perfecting press in 1868.

In 1846, Robert Hoe, founder of the world-renowned American printing machinery manufacturing firm, built a new style of press. This was known as the Hoe type revolving machine. The type cylinder was placed in a horizontal position and the type secured in cast-iron beds by special locking up apparatus. Each bed represented one page of a newspaper. Grouped around the type cylinder were four, six or ten impression-cylinders, each of which had feeders laying on sheets of paper. As the main cylinder rotated, the type was inked by a roller, the sheets as they were fed in being taken by grippers to receive the inked impression of the type. In this instance, the sheets were delivered by means of " mechanical flyers ". This machine was capable of turning out 2,000 sheets per feeder per hour i.e. with a four cylinder machine, 8,000 impressions were obtained.

Spurred on by the newly harnessed steam-power, another great era of printing invention had begun. New and faster printing machines were invented. In 1851 an Edinburgh publisher, Thomas Nelson, evolved a completely new type of machine which printed the paper from curved printing plates affixed to revolving cylinders. This machine was the forerunner of today's newspaper machines, through which reels of paper race at great speed to emerge, printed and folded, at the rate of fifty thousand copies an hour.

That is, an impetus was given to the production of newspapers by the invention of the paper making machine by the brothers Fourdrinier in 1803, while the knowledge of how to cast curved stereo-plates also helped forward the development of newspaper production. In 1863, the first printing press to print from a continuous reel of paper was made by an American named William Bullock. The machine consisted of four cylinders - two impression cylinders and two plate cylinders - but as the paper passed from the reel it had to be cut before printing. This led to many difficulties and the machine was soon discarded owing to its unreliability.

The proprietors of ' The Times ' were continually endeavouring to construct a rotary perfecting machine and in 1868 the famous Walter rotary perfecting press was built to print The Times. A reel of paper was used, both sides being printed from curved stereo-plates and the sheets

delivered flat. These were used until 1895, and were undoubtedly the models from which present-day newspaper rotaries have developed. One drawback to the speedy production of newspapers in the early days of the rotary machine was that they were delivered flat and had to be folded by hand. In 1870, the first folder attachment was invented by two English engineers, G. Duncan and W.A. Wilson, and since then the development of the rotary press has been rapid; the reason undoubtedly being the overcoming of the folding difficulty, which in turn has enabled proprietors to produce newspapers in large numbers at which they are now sold. Present-day newspaper presses are capable of printing simultaneously from as many as 15 reels and to produce over 3,00,000 copies per hour. Credit must be given to Sir Rowland Hill for the inception of the idea of printing on both sides of the paper from a reel; the suggestion having emanated from him in 1835.

In 1822, Daniel Treadwell of Boston applied power to a machine built on the " bed and platen " principle. The original machine of this type was improved upon by Adams of Boston, and for many years this class of machine was used for printing fine books and woodcuts.

The next notable development of a printing machine was one worked by treadle and adaptable for the printing of small jobbing work such as cards, hand-billsetc. The first machine of this character was made by S. P. Ruggles, of Boston, Mass., in 1830 and was known as the Ruggles card press. Lastly, over a quarter of a century later (1856),

George P. Gordon, an American, built a press which proved to be the forerunner of what are now known as light platen machines. This was constructed with the type bed in a vertical position, was named " the Franklin ", and rapidly became in general use throughout the world.

The introduction of the power press and the machine manufacture of paper decreased production costs, and made possible a vast increase in quantity production, which was further augmented by the technological changes in the last decades of the nineteenth century and the beginning of the twentieth. With the introduction of machinery came the disintegration of guilds. Books circulated more widely through circulating libraries and new trade channels, and by means of the sale of the publisher's reminders. Patronage as a means of financing the publication of books gradually declined and payment to author by royalty became the general practice.

The United States, England, Germany and Soviet Union are now the most important countries in printing and publishing. The printing industry in United States in 1929 paid one twentieth of all manufacturing wages and ranked seventh in the total value added by manufacture. Book and job printing made up 31 per cent of the total value of the output, while newspaper and periodical printing comprised 56 per cent; 41 per cent of all workers were employed and 40 of all wages were paid in book and job printing, 33.1 per cent and 40 per cent respectively in newspaper and periodical printing.

Commercial printing is centred in New York City, which produces 24 per cent of the output, and in Chicago, which manufactures 16 per cent, the remaining 60 per cent is widely diffused; no other city printing more than 4 per cent of the total and only 12 as much as 1 per cent. Because of the many small units producing for local consumption the number of establishments in publishing and printing and allied industries exceeds that of any other industry in the United States. In 1929, these totalled 27,522 - a decline of 6,225 as compared with 1,919. The major portion of the production, however, is concentrated in a few large plants in book and job printing and in the newspaper and periodical branches of the industry.

According to the United States Corporation income-tax returns the net income of printing and publishing corporations increased from $ 97,477,000 for 8,429 corporations reporting in 1921 to $ 223,080,000 for 11,170 corporations in 1929. In the latter year the total gross sales reported were $ 3,639,7000,000 and the total net profit minus taxes was $ 218,800,000; 10,069 corporations reported a total net capital investment of $ 3,113,000,000. A comparative analysis of the 1925 corporations income tax returns of the leading industries in the United States indicated that the printing and publishing industry ranked second in the percentage of corporations showing a profit which totalled 65.7 per cent, and also second in terms of the percentage of gross profits on sales, which totalled 28 per cent; the percentage of successful firms reporting profits of $ 10,000

or more in that year was 70.3 per cent.

Within the last fifty years the new machinery which has been introduced into the composing room, the press room and the bindery has revolutionized the industry. The Linotype and related machines practically supplanted straight matter type-setting by hand between 1886 and 1903. Although the Linotype operator sets about four times as rapidly as does the hand operator, there appears to have been relatively slight immediately displacement of labour both in the United States and in Europe, because the technical character of the Linotype required for its most successful operation the skill of the superceded handicraftsman and also because the market for printing expanded. Composition by monotype and preparation of the form by photographic processes largely eliminate type composition and thus are affecting employment.

Cylinder presses were first installed in the press rooms of the United States in 1882, modern rotary presses in 1890 and automatic press feeding attachments in 1899. By 1919, less than 4 per cent of platen and cylinder presses used in commercial printing in the United States were mechanically fed; by 1921 the proportion had mounted to 66 per cent. The installation of automatic feeding attachments and self-feeding job and small cylinder presses has continued rapidly; in 1929, 44,000 out of 64,000 presses sold were automatically fed. The effects of this mechanisation are revealed in the United States census statistics, which show that while value added by manufacture in book and job printing rose more than

760 per cent from 1899 to 1929 - only 120.1 per cent more workers were employed. In newspaper and periodical printing the results are even more striking; the value added by manufacture increased 679.4 per cent between 1899 and 1929, while the number of workers increased only 34.8 per cent. The productivity of labour per man hour in newspaper printing increased 264 per cent from 1896 to 1926. In 53 commercial printing plants studied in New York city, while there was a 7.9 per cent increase in employment of skilled pressmen in 1929 as compared with 1924, there was 5.7 per cent net displacement of unskilled or semi-skilled press assistants; although the relative number of men employed increased slightly on the old models, it declined on the new ones. The bindery has likewise been mechanised by the installation of automatic processes for folding, gathering and covering books and magazines.

Modern printing machinery led to the departmentalization of the printing industry which in turn resulted in the specialization of craft unions in the United States. The International Typographical Union, which took permanent form through a combination of local organizationsin 1852 and which later affiliated with the American Federation of Labour, included Compositors and Press-room workers. The pressmen had broken away from the compositors by 1889 and had founded their own international organization, the International Printing Pressmen, which in 1896 expanded to include the press feeders and became the International Printing Pressmen and Assistant's Union.

It may be concluded by saying that the printing industry has grown very rapidly since 1900. Technically there were much change. Compositors and printers, publishers and book-sellers, borrowers and buyers of books adopted or were forced to new ways of production and consumption. There was rationalised organisation. New inventions lowered the cost of production and mass literacy created further demands for printed materials. At the same time the national and international organisation of the printing trade widened the channels.

The complete mechanisation of the whole process from letter-founding to book-binding was nearly all the time expanding every section of the trade and strengthening its economic security. The book-buying public was reaping the advantages of greater efficiency, better quality and reduced prices.

As printing fast is becoming the means of enlightening the masses, the press in India should keep pace with the improved methods of composing, and the technique of printing should be up-to-date. In free India, the educational status of the age has favoured changes, and the printing trade is trying to respond to the need.

As in all other fields of industrial enterprise, the printing industry has also made its progress in this country, but mostly without Governmental lead or help. There are more than 20,000 printing houses spread all over the country, but only a few of them can be said to be quality printers, turning out jobs comparable with the worlds best

in the line.

Today, the presses are scattered all over the sub-continent and with the attainment of independence the number of printing presses, the newspaper presses and job presses has immensely increased.

According to the survey undertaken by the Government of India and All India Federation of Master Printers in 1953 to 1954, 70 per cent of the printing presses were located in five states of Bombay, Delhi, Madras, Uttar Pradesh and West Bengal.

The printing industry in these five states is mainly located in the city of Bombay, Delhi, Madras, Allahabad and Calcutta. The number of printing presses in Bombay city is less than 800. There are 350 printing presses in Madras, 160 in Allahabad and 2,278 in Calcutta. In Delhi, the number of printing presses is nearly 1,200. But, it is only in Calcutta and Bombay where the printing industry has developed in a scientific way.

The printing industry in our country needs more of state help and co-operation to ensure an un-interrupted progress in its various branches. Neither the industrialist nor the State has promoted satisfactory development, despite the fact that the spread of knowledge was the responsibility of the one or the other. Now, the brochure published on the occasion of the All India Printers Conference and Exhibition has touched upon many important problems which face the industry in our country at the present time and draws the attention of those who are directly concerned with, or responsible for, necessary improvements in it. It is hoped that it will be found useful by those who are interested in the progress of this vital industry of our country.

B - METHODS OF PRINTING

Besides being an art and one of the chief means of communication, printing is a great industry.

The term ' printing ' can be applied to any process by which a print is obtained. Printing is the act or practice of taking impressions from ink-covered types, plates or other surfaces containing a design, upon a paper or similar material. Printing is the business or occupation of a printer such as type-setting, press work and its necessary adjuncts.

There are a number of methods and processes for graphic arts reproduction. But, there are three basic methods of printing used in the printing presses which are as follows : -

1 - Relief printing or Letter Press Printing,

2 - Lithography,

3 - Photoengravure.

Relief Printing -

Relief printing, often referred to as Letter Press printing, is the oldest and by far the commonest

printing process. Practically all newspapers, most books, magazines and commercial jobs are printed by this method.

When we speak of relief or letter press printing, we mean printing from the raised surfaces of the types or plates. In relief printing, the raised surface is covered with ink and an impression of the format is then transferred to paper. Relief printing includes all procedures used in printing directly from raised surfaces. Letter press printing can be done with type, line, engraving or halftone blocks. Since all relief printing must have surfaces uniform in height, a standard based on the height of the shank of metal which comprises the type, has been universally accepted.

There are three basic methods of securing the impressions of the raised surface on paper and these have resulted in the design of three major types of printing machines for letter-press printing. They are : -

1) The Platen press (automatic platen and hand platen press) which gives the impression of the whole printing surface at the same time ;

2) Cylinder Press - carries the paper on a cylinder bringing it into contact with the typed form as the bed moves back and forth and the cylinder revolves over it; and

3) Rotary press employs a curved printing surface which revolves against the impression cylinder. Letter-press printing relies upon direct physical

contact between the inked printing surface and the paper. It has crispness and brilliancy which is unmatched by any other process.

Machines which use ordinary printers' type are known as letter-press, type-set or relief printing machines. Type is normally made of metal and is available in a large variety of faces or styles, each being known by a different basic name in order to distinguish it. It is also supplied in various sizes. There is a wide variety of names given to the different type designs, such as Gill, Times, Bodoni, etc. These basic designs are sub-divided into styles which have a general resemblance, but have their own particular characteristics. Thus, the Gill family is divided into Gill Light, Gill Sans, Gill Sans Bold, Gill Sans Italic and many others. Since all these types which originate from the basic type have resemblances in some way or another, they are known as families.

The printer measures his type in terms of " points " e.g. 10-point Times, or 8-point Gill Sans. But, it should be noted that the point used by American and British printers is smaller than the point used by printers on the European continent; so we should buy type from one or the other area, but not from both. A complete alphabet, including the additional signs required, is generally called a fount or font.

The machines which use relief type are often large and costly and specially designed for extremely

high speeds. They require skilled staff to operate them. There are, however, a number of both small and medium sized machines which are able to produce prints of a very good quality and which can be operated without special training or skill. This type of apparatus is available in small flat-bed or semi-automatic and power rotary machines. Some are available which print from carbon ribbon roll and are used to give the printed matter the appearance of having been produced on a type-writer. This enables circular letters to be printed in large numbers, each having the appearance of an individually typed letter.

There are various methods of setting up the type when using these small printing machines. It is necessary in all cases to prepare it in reverse or backward, because the printing is direct and the copy paper being in contact with the type face will therefore reverse the image again to read correctly. Loose type is laid out in special boxes, each letter having its own compartment. This makes the selection easy and reliable.

The rotary type of machine is fitted with grooves or segments which hold the type securely. Special composing sticks or forks are available and the type is first transferred into these holders and, when complete, is placed line by line into the grooves of the machine.

Both line and half-tone blocks can be made for use in relief apparatus. The preparation of these is generally beyond the scope of the average reproduction unit, but the makers of the machine, hold large stocks

of designs on request.

The rotary machine is able to print at normal duplicating speeds and is, therefore, ideal for the production of forms and such material as cannot be produced by other types of machines. It is able to use various colours of ink and the carbon type can print several colours simultaneously (since the use of carbon makes it in effect).

The small machines, using relief type which are really miniatures of the big type-set machines, are available in most countries. They are in appearance only toys, but are well made and capable of producing work of first class quality. The cheaper types are slow in operation, since each sheet is placed on the machine by hand; but apparatus is available capable of giving up-to 1,000 prints per hour.

Numerous small and cheap booklets are available which outline in detail how to set-up the type for use in these machines. These are available from the makers of the apparatus and should be carefully studied by all who require the type-set appearance and cannot afford the large costly machine.

The low price and the simplicity of these small machines should not be taken as an indication that they are not capable of producing good work. They use the same type ink and paper as the very large machines, and with care and a little experience will produce comparable results, though not at comparable speeds or of comparable

sizes.

Printing from stereotype, electrotype and photo-engraved plates, as well as printing from hand-set and machine-set type and slugs, is a modern adaptation of relief printing.

Lithography -

Lithography, though still much less common than letter-press work, is the most rapidly growing method of reproduction. Practically all items printed by the relief process are also produced by lithography, including for example, books, calendars, maps, posters, labels, office forms and even newspapers. Almost all printing on metal and much of the printing on rough paper is done by this method.

The process of lithography was accidentally discovered by Aloys Senefelder in 1796. Since its invention, lithography has developed into a major industry, retaining the name which means stone writing. Lithography offers the advantage of being able to produce every kind of copy-type, line or half-tone. Ordinarily, lithography has great advantages for larger runs and labels and is besides a cheaper process. Better effects can also be obtained for show-cards and in printing posters; it undoubtedly holds the field.

In fact, lithography is a well established method of producing prints of good quality. It is widely used by professional printers for high class work of large sizes

Lithography is based on the well-known principle that grease and water will not mix. The masters used in this process, therefore, consists of a material able to hold water or other chemicals and an image of a greasy nature which attracts the greasy ink used in the process. Originally, the matter used was a special stone having porous qualities. This method produced very good results, but was very low.

There are two forms now in general use, one which creates the copy direct from the master and the other which transfers the image from the master to another roller which is made of hard rubber and is known as a blanket. The copies are produced from this blanket and this gives it the name of " offset ", since the image is offset from the plate to the blanket and set off then again to the copy.

The offset method has many advantages over the direct form of lithography. Its chief value is that it allows typing or drawing to be done directly on to the master. The offset method also allows paper of a much cheaper quality to be used. A serious disadvantage of the ordinary form of lithography, including the stone method is, that the image must be drawn or transferred in reverse so that the prints taken from it read correctly. This is a very serious handicap, particularly when using a type-writer.

For many years, metal plates, zinc or aluminium have been in common use. Recently, paper or plastic plates have been made available and these are obtainable in

different qualities, the cheap ones being designed for very short runs. The better quality paper plates are able to produce many thousands of copies. It will, therefore, be seen that by the use of an appropriate plate, paper or metal, this process is suitable for all types of work. The metal plates can be specially coated to enable them to make extremely long runs of many thousands of copies, when these are required.

Both the metal and non-metalled plates can be stored for re-use. Some of the cheaper paper plates are not suitable for storage over long periods. The life of these cheap plates depends a good deal on the method of use. Operators using too much moisture can weaken the plate and thus shorten its life considerably.

Operators -

The machines used in ' offset ' are all of the rotary type and electrically driven. Some are hand-fed or have simple friction feeds, but most models have suction feed and work at high speed.

The maximum size they are able to print is generally upto 14" x 20", though in some countries, they are available for large sizes. Offset machines of the traditional type are available in most countries. These are big machines and are able to print from large rolls of paper or cut sheets and frequently in two or more colours. Such machines are in effect a number of machines in one and the printing is done consecutively, two sheets or rolls passing

from one colour to another, emerging finally as a full colour-print. The operation of such machines requires professional training and much skill.

Reproduction of the Master -

There are numerous methods by which offset masters can be prepared. They can be typed direct, written or drawn with the aid of a greasy pencil, pen or crayon. The image may also be transferred from a pencil or by other intermediary masters. Anything that can be photographed in the same size, or reduced, or enlarged can be printed down on to a metal plate. Stencil apparatus of the flat bed type, or the ' ordoverex ' process also can be used to transfer the image to a plate.

A metal plate is typed by using special greasy ribbons. This can be corrected by erasing the greasy ink. Paper plates are typed with a carbon paper ribbon and erased with a special fluid which removes the deposited grease. For writing or drawing direct on to the plates, special greasy pencils or ball-point pens are available. These are also erased by the same method.

The plate can also be coated with a sensitive emulsion which, when dry, allows an image to be printed on to it. The coating is done by pouring this solution on to the plate while it is being revolved in a whirling machine, which causes the emulsion to spread in an even coat. It is dried by the application of air, as it revolves. These operations are conducted in a normal room lighting,

since the emulsion is not very sensitive to light. The plate and the master are held in contact in a pressure frame and are exposed to a powerful light, normally arc or mercury. Greasy ink is then rubbed over the plate, followed by a gentle wiping under a jet of water.

Where, light has passed through the negative, the emulsion has been hardened, but where it has not received an exposure, it is still soft and is, therefore, rubbed away, leaving the hardened image with the grease-attracting ink attached to it. This, when attached to the machine, will attract the greasy ink and therefore create the image which is later transferred to the copy.

Paper plates which have been pre-sensitized by the manufacturers are also available. These are useful where photographic plates are only occasionally required.

The photographic method widens the scope of the offset machines and enables intermediate masters, which can be prepared by photography or photo-copying or other processes to be used.

In some countries, yellow or green stencils, known as diapositive stencils, are available. When typed, these can be printed on to the sensitized plate, since the yellow stencil acts as a barrier to the blue printing light, but allows light to pass through the parts cut by the type-writer or stylo. It is claimed for this method that it gives a better result and that the stencil is more easily corrected. It also can be more conveniently stored, since it is dry and is, therefore, readily withdrawn for

any additional runs, when required.

The metal plates, prepared by photographic means can be immersed in an acid bath to remove the previous image and make them suitable for re-use. This is useful when plates are difficult to obtain, and saves considerable expense.

Continuous tone -

When photographs are required to be printed on ink printing machines, it is necessary to use what is called a half-tone screen. A photograph printed photographically from a negative is called a continuous tone print; a reproduction printed with a screen is termed a half-tone print. The screen breaks the image into small dots of varying sizes according to the density of the black image on the original. Screens known as ' 120 ' or ' 133 ' are most frequently used in the offset method.

That is, the offset process is confined to rotary machines generally giving a high output.

It uses masters made of metal, plastic or paper. It can be used economically for both short and long runs according to the master used. Special plate coatings enable extremely long runs to be made when these are required.

Offset printing gives a softness and texture which is unequalled by that which you get from direct printing owing to the pliability of the rubber blanket, and therefore, with many subjects where there is a harmonious

blending of colours, the finished result is very soft and beautiful.

The numerous advantages of offset printing give promise of its growth in popularity, though it will probably never compel the abandonment of other methods of printing, either lithographic or typographic. Each kind of press and the various processes will continue still to hold their constructive places in the art.

The prints are of good quality. They are durable and can be printed in many colours.

The process is widely used, throughout the world.

Lithography or today's photo-litho offset has made a tremendous progress in the field of graphic art. It has gone from stone to a zinc plate and on to a bi-metal and even to a tri-metal plate. It has advanced from tin printing to bond paper, to cloth and its versatility has been used for printing on glass, plastics etc. It has graduated from ordinary black ink to many colours, including gold, silver and fluorescent and other metalic inks.

Modern offset reproduction is more dependent on photo-mechanical operations than on hand operations, for accuracy and faithful reproduction, as well as reducing the cost. Continuous tone colour separation negatives are corrected on the camera by colour-masking, using various types of masking processes.

It is generally agreed that the subtractive printing colours available in the market are not perfect enough as far as pigmentations are concerned. This is due to the fact that the blue-green ink does not reflect sufficient green light nor sufficient blue violet as it should. Similarly, magenta

ink does not reflect enough of the desired blue-violet light. By correct application of masking technique, some improvements can be achieved to minimise these deficiencies.

Offset plate-making has advanced rapidly with the progress of science, specially in the sections of metallurgy and chemicals. A wider range of bi-metal and tri-metal plates, such as Coates, Aller, Boekelman and Elfers, I. P. I. tri-metal plates etc., are already in commercial use, giving immensely longer runs, yet retaining the finer details of the reproduction.

A number of pre-sensitised plates, such as 3-M plates, of a very high degree of quality, are also in use now-a-days. Modern " Step and Repeat " machines also come in the picture, by which multiple images can be reproduced on the metal plate from a single unit of negative or positive with automatic and accurate registration.

Offset printing machines have made long strides towards progress and improvement along with the technological developments that combine structural durability, high definition, and increased speed. The multi-colour offset machines not only afford the printers an excellent and high quality of reproduction but also have saved time and cost.

Gravure or Photoengraver -

Gravure or photoengraver printing, the least common process, is of two main types : Rotogravure (in which, press plates are made from pictures by a method based on photography)

and hand or machine engraving. Sunday newspapers are the best known rotogravure products. Hand or machine engraving is used in making engraved stationery, greeting cards and similar products.

Process Engravers' Role in India's Printing Industries -

In our country, now faced with the problems of combating mass illiteracy, developing new industries, expanding both the home and foreign markets for our products, printing industry, obviously occupies a distinct position of immense responsibility and importance.

At the same time, we must realise that to obtain the maximum results from the printing industry, in any or all of the above fields, ' printed matter ' has to be presented in an attractive and inviting manner. People usually do not find much interest in reading the printed matter unless the printing is good, lay-out is good and the presentation is irresistably inviting. Though it may sound blunt, printing, more often than not, has to be forced on the readers with attractive persuations. All sales-activities are directly correlated to display, and printing also conforms to this general rule.

On the capacity of making the presentation attractive, depends the speed and certainty of the printed matter being read with real interest. And in this difficult task of the presentation of printings, colours, lay-outs and process blocks, all play a very important and essential part.

Where sure results or quick results are desired, the importance of the use of Process-Blocks is undeniable. The story told in a thousand words may be lost. But the story told in one magnificient multi-colour illustration is sure to be taken note of and accepted. This is a scientifically established fact.

From the secondary position, condescendingly given to the Process-Engravers in the country, it is perhaps reasonable to infer that the essential and important role of Process-Blocks in achieving quick and effective results is still under-estimated. Nevertheless, the fact remains that Process-Engravers must continue to play their part in various important fields where their services are needed.

We are all agreed that mass education is a vital necessity. The Union Government have also given reasonable priority to this aspect, both in the First and the Second Five-Year Plans. As per estimates (or shall we call them targets ?) of the Second Five-Year Plan, 63 per cent of the children in the age group 6 to 11 years, and 27.5 per cent of the children in the age group of 11 to 14 years, would come under the benefit of free and compulsory education. The number of students will increase by 7.7 million at the first stage, and by 1.3 million in the second stage, requiring 53,000 new primary schools and 3,500 new middle schools.

The above figures would convincingly establish the thesis that in order to achieve the desired results, we shall need plenty of illustrated books, pictorial magazines, and help-books etc.

Can we produce these illustrated reading matters without liberal use of Process-Blocks ? How then shall we speed up the pace of mass-education ?

Now, take the instance of new industries. The new industries that are growing and should be growing, must be able to speak their own stories effectively and usefully. Could any one think that they could do so without the assistance of blocks ?

Then, again, in the sphere of publicity and propaganda, the use of blocks in all sorts of combination, is indispensible. The products will be adjudged by the manner their story is told. If the publicity matters - brochures, hand-outs, leaflets, and press advertisements look poor in get-up and create an impression that you were careless or miserly in the presentation of your stories, do you think sales promotion is possible ?

The significance and impact of this aspect have to be remembered, particularly in the preparation of publicity and propaganda materials for foreign countries. People reading our advertisements or booklets at a distance of many hundred miles, will judge our product from our publicity matter which reaches them first. It is difficult to get over the first impression, as we all know.

If the publicity matter is poorly represented and cheaply produced, it is impossible for it to cut any ice with the well-to-do and sophisticated people of more advanced countries. People reasonably judge a country by the quality of its people and products they come in contact with. Poorly

produced reading matter sent out of the country, is liable to damage the reputation of the countrys' printing as much as its general cultural and economic potential.

If we remember the implications of the above, we must allow adequate priority to the problems of Block-Makers who are now struggling against many odds, created by adverse circumstances and also by the secondary position assigned to this industry.

The attention of the Union and the State Governments should be invited to the anomalous position of block-makers in their scheme of promoting ' Quality and Display ' of reading matters.

The " State Awards " are meant to build-up efficiency of printing and also the art of presentation. These are awarded for printing under as many as 19 categories. I wonder, why Process-Engraving has not been included in the list, though it possibly has the biggest say in the field of coercing the reader's eyes on the reading matter provided. Process-engraving, therefore, deserves to be included in the list for " State Awards ", on its own merit. It is unfortunate that for the rectification of this omission, no efforts have so far been made.

All these basic methods of printing are widely used commercially in the progressive countries. The demand for printing has increased at such a rapid rate that no method has suffered from the introduction or expansion of another. Significant developments have been taking place in all the three spheres. In fact, progress is so rapid that many revolutionary changes may appear in the course of a decade. Hence, it is

well nigh impossible to hazard a guess as to the most popular and effective method of printing in future. Of one thing, however, we are certain: decorations, illustrations and letter forms, such as we have in printing types, will continue to be the contents of the printed stage, regardless of the method of reproduction.

Process of Printing -

There are a number of special purpose processes for graphic art reproduction. The two which are most widely used commercially are the Silk Screen and the Collotype or photo-gelatin process.

Silk Screen Printing - In the Silk Screen process, a method practically as old as the relief printing process, ink or paint is squeezed through a stencil consisting of solid and porous sections of the screen by a squeegee, usually in the form of a rubber blade. Since silk is generally used for the porous section of the stencil, the process is so called. The method is adopted in printing on objects having surfaces which cannot be run through a press, such as milk bottles, cloth bags, felt pennants, furniture and toys, and competes with other processes of printing in the production of play-cards, posters and other display materials.

Collotype - This process is called photo-gelatin, capable of reproducing tone, but without breaking off the original into a fine dot pattern. Collotype gives exact reproductions of any photographic or illustrative subject in

exercise of religion. The Court argued :

> "When the proponents of religious or social theories use the ordinary commercial methods of sales of articles to raise propaganda funds, it is a natural and proper exercise of the power of the state to charge reasonable fees for the privilege of canvassing.... It is prohibition and unjustifiable abridgment which is interdicted, not taxation. Nor do we believe it can be fairly said that because such proper charges may be expended into unjustifiable abridgments they are therefore invalid on their face.... We view these sales as partaking more of commercial than religious or educational transactions that we find the ordinances, as here presented, valid. A tax on religion or a tax on interstate commerce may alike be forbidden by the Constitution. It does not follow that licences for selling Bibles or for manufacture of articles of general use, measured by extra state sales, must fall. It may well be that the wisdom of American communities will persuade them to permit the poor and weak to draw support from the petty sales of religious books without contributing anything for the privilege of using the streets and conveniences of the municipality. Such an exemption, however, would be a voluntary, not a constitutionally enforced, contribution."[33]

It is worth noting that this judgment was given by a 5 to 4 majority. Next year, in 1943, again another case of the same type arose.[34] By this time, Byrnes, J., who had concurred in the majority judgment, resigned[35] and was succeeded by Rutledge, J. The new Judge favoured the minority

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33. Roscoe Jones v. City of Opelika, 316 US 584, 597-8(1942).

34. Robert Murdock v. Commonwealth of Pennsylvania, 319 US 105 (1943).

35. He resigned on October 5, 1942. The Opelika case was decided on June 8, 1942. After his resignation, Rutledge, J., was commissioned on Feburary 11, 1943 and the judgment in Murdock case was announced on May 3, 1943.

opinion of the *Opalika* case.[36] The city of Jeannette, Pennsylvania, had a forty years old ordinance imposing a licence tax ranging from $ 1.50 a day to $ 20 for three weeks, for the privilege of canvassing or soliciting orders for any article. The petitioners, 'Jehovah's Witnesses', were arrested for asking people to purchase certain religious books without having obtained the licence from the Treasurer of the Borough before doing so. The Court, by a 5 to 4 decision declared the licence tax unconstitutional. The majority view now conceded that any tax, which was specifically imposed upon the exercise of religion would be illegal. In the instant case, the Court viewed the licence tax not as a tax on commercial activities but as a tax on the freedom of religious propaganda. In so far as it imposed tax on the religious propaganda it was invalid. The Court accepted the petitioners' contention that the distribution of religious literature was an age-old form of missionary work. Douglas, J., delivering the majority judgment traced out its history in the following words :

> "The hand distribution of religious tracts is an age-old form of missionary evangelism - as old as the history of printing presses. It has been a potent force in various religious movements down through the years. This form of evangelism is utilised to-day

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36. Rosco Jones v. City of Opalika, 316 US 584 (1942).

> on a large scale by various religious sects whose colporteurs carry the Gospel to thousands upon thousands of homes and seek through personal visitations to win adherents to their faith. It is more than preaching; it is more than distribution of religious literature. It is a combination of both. Its purpose is as evangelical as the revival meeting. This form of religious activity occupies the same high estate under the First Amendment as do worship in the churches and preaching from the pulpits. It has the same claim to protection as the more orthodox and conventional exercises of religion. It also has the same claim as the others to the guarantees of freedom of speech and freedom of the press."[37]

The view taken in the earlier case of Rosco Jones v. City of Opelika[38] was not adopted by the Court. The Court held that merely because the religious literature was not "donated", but "sold" did not mean that it was a commercial transaction. Douglas, J., speaking for the Court, said :

> "But the mere fact that the religious literature is "sold" by itinerant preachers rather than "donated" does not transform evangelism into a commercial enterprise. If it did, then the passing of the collection plate in church would make the church service a commercial project. The constitutional rights of those spreading their religious beliefs through the spoken and printed word are not to be gauged by standards governing retailers or wholesalers of books... It should be remembered that the pamphlet of Thomas Paine were not distributed free of charge. It is plain that a religious organization needs funds to remain a going concern. But an itinerant evangelist however misguided or intolerant he may be, does not become a mere book

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37. Robert Murdock v. Commonwealth of Pennsylvania, 319 US 105, 108 (1943).

38. 316 US 584 (1942).

> agent by selling the Bible or religious tracts to help defray his expenses or to sustain him. Freedom of speech, freedom of the press, freedom of religion available to all, not merely to those who can pay their own way."39

The Court further said that the state could impose taxes upon the income of the religious preachers or upon the property of the religious institutions, but it could not charge a tax for the privilege of delivering a sermon. The Court was of the opinion that a person could not be compelled to purchase through a licence tax a privilege that was freely granted by the Constitution. The fact that a tax was imposed without any discrimination between the religious literature and other articles of merchandise could not make it constitutional. As to the non-discriminatory nature of ordinance, the Court said :

> "The fact that the ordinance is "nondiscriminatory" is immaterial. The protection afforded by the First Amendment is not so restricted. A license tax certainly does not acquire constitutional validity because it classifies the privileges protected by the First Amendment alongwith the wares and merchandise of hucksters and peddlers and treats them all alike. Such equality in treatment does not save the ordinance. Freedom of press, freedom of speech, freedom of religion are in a preferred position."40

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39. Robert Murdock v. Commonwealth of Pennsylvania, 319 US 105, 111 (1943).

40. Id., at 115.

The same day when the judgment in Robert Murdock v. Commonwealth of Pennsylvania[41] was pronounced, the Supreme Court reversed its own previous decision in Rosco Jones v. City of Opalika[42] and declared unconstitutional the ordinances attacked in that case.

In 1944, the United States Supreme Court, in the case of Lester Follett v. Town of McCormick, South-Carolina,[43] extended the rule laid down in Robert Murdock v. Commonwealth of Pennsylvania[44] to all sales of religious literature even if they were made by businessmen earning their livelihood from these sales and even though they were not the conventional evangelist or 'Jehovah's Witnesses'.

In India, the question of taxing religious activities has not arisen in the manner in which it has in the United States. Here there is no organised church as we find in America. The state in India, therefore, assumes a greater power and responsibility to see that religious institutions run and prosper within the rights guaranteed to them under the Constitution. In order to discharge

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41. 319 US 105 (1943).

42. 316 US 584 (1942). Opinion reversed, Rosco Jones v. City of Opalika, 319 US 103 (1943).

43. 321 US 573 (1944).

44. 319 US 105 (1943).

this function and to see that religious institutions run efficiently, Indian legislatures have passed several enactments to provide for the constitution of managing Boards to look after the proper management and administration of religious institutions. The expenses of such Boards are usually met by a contribution levied upon the institutions themselves. The question arose in certain cases as to whether this contribution was a tax upon religion, or a fee,[45] levied upon them to meet the specific expenses of the institutions and if the same was not invalid. In _Sri Jagannath Ramanuj Das v. State of Orissa_,[46] the Supreme Court found the contribution to be a fee and not a tax, while in _Commissioner Hindu Religious Endowments, Madras v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt_[47] the contribution was held to be a tax. In the former case[48] the contribution was to be made to a fund constituted separately to maintain the commissioner and other

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45. A fee is different from a tax in as much as the latter is a compulsory exaction of money by a public authority to meet the general expenses of the state without reference to any special benefit to be conferred upon the payers of the tax, whereas the former is a payment for some special service rendered by the state. _Sri Jagannath Ramanuj Das v. State of Orissa_, AIR 1954 SC 400, 403; _Mahant Moti Das v. S.P. Sahi, The Special Officer in Charge of Hindu Religious Trust_, AIR 1959 SC 942, 950.

46. AIR 1954 SC 400.

47. AIR 1954 SC 282, 296.

48. _Sri Jagannath Ramanuj Das v. State of Orissa_, AIR 1954 SC 400.

officers and servants of the Board. The collections were not merged in the general public revenue but were kept separate to be appropriated in the manner laid down for appropriation of expenses under the Act. The state also contributed grants to this fund. But in Commissioner Hindu Religious Endowments, Madras v. Sri Lakshmindra Tirtha Swamiar of Sri Shirur Mutt[49] the contribution was not kept separate for the expenses of the Board but formed part of the state's revenue. The Court, therefore held that the contribution in that case was in the nature of tax.[50] In the former case the contribution not being a tax, article 27 could not be applied.[51] In the latter

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49. AIR 1954 SC 282.

50. The Court gave the following reasons to support its contention that the contribution was not a fee but a tax :

    (1) The money raised by the levy of the contribution was not earmarked or specified for defraying the expenses that the Government had to incur in performing the new services.
    (2) All the collections went to the Consolidated Fund of the state and all the expenses had to be met not out of those collections but out of the general revenue by a proper method of appropriation as was done in case of other Government expenses.
    (3) There was total absence of any co-relation between the expenses incurred by the Government and the amount raised by contribution under the provisions of section 76 and in these circumstances the theory of a return or counter payment or Quid pro quo could not have any possible application to that case.

    Id., at 296.

51. Even if the contribution would have been found to be a tax as held in Shirur Mutt case (ibid) it would have not been unconstitutional.

case though the contribution was found to be in the nature of a tax, the Court held that it was not unconstitutional. With reference to the prohibition under article 27, the Supreme Court said :

> "What is forbidden by the Article is the specific appropriation of the proceeds of any tax in payment of expenses for the promotion or maintenance of any particular religion or religious denomination. The reason underlying this provision is obvious. Ours being a secular state and there being freedom of religion guaranteed by the Constitution, both to individuals and to groups it is against the policy of the Constitution to pay out of public funds any money for the promotion or maintenance of any particular religion or religious denomination."[52]

The Court noticed that the object of the contribution was not the preservation of the Hindu religion or any denomination thereof. Its purpose was to see that religious trusts and institutions, wherever they existed, were properly administered. This was a secular administration of the religious institutions just to insure that the endowments attached thereto were properly administered and their income was duly appropriated for the purposes for which they were founded.

Articles 25 and 26, which guarantee religious freedom in India, lay down the limits within which an individual is entitled to religious freedom. Under article 25(2)(a) the state is entitled to make laws for regulating or

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52. Commissioner Hindu Religious Endowments, Madras v. Sri Lakshmindra Tirtha Swamiar of Sri Shirur Mutt, AIR 1954 SC 282, 296.

restricting the economic, financial, political and other secular activities which might be associated with religious practice. The state is further allowed to make laws providing for social welfare and reform, and for the throwing open of Hindu religious institutions of a public character to the general public.

The leading case, on the point in India is _Commissioner Hindu Religious Endowments, Madras v. Sri Lakshmindra Tirtha Swamiar of Sri Shirur Mutt._[53] In that case, the Hindu Religious Endowments Board was constituted under the Madras Hindu Religious Endowments Act, 1927,[54] in order to devise a scheme for the administration of the _Shirur Math_. The petitioner who was the Mathadhipati or Head of that Math founded by the saint Madhwacharaya in South Kanara, challenged the validity of the Act,[55] as infringing several fundamental rights guaranteed under the Constitution. Section 30(2) of the impugned Act required the Mathadhipati to be guided by the directions of the Commissioner and the Area Committee in spending money

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53. AIR 1954 SC 282.

54. Madras Act 2 of 1927. This Act was replaced by the Madras Hindu Religious and Charitable Endowment Act, 1951. Section 103 of the new Act provided that the notifications, orders and acts under the 1927 Act were to be treated as notifications, orders and acts issued, made or done by the appropriate authority under the corresponding provisions of the new Act.

55. The Madras Hindu Religious and Charitable Endowments Act, 1951 (Madras Act 19 of 1951).

out of the surplus. Section 31 required him to obtain previous sanction of the secular authority for incurring expenditure out of any surplus that might be left after expenditure, referred to in section 30(2). The Supreme Court found that as the conception of Mahantship was blended with the elements of office and property, and, according to the existing law based on judicially recognised custom, "the Mohant has large powers of disposal over surplus income and the only restriction is that he cannot spend anything out of it for his personal use unconnected with the dignity of his office,"[56] the sections were unconstitutional as infringing article 19(1)(f). The Court pointed out that other sections of the Act sufficiently ensured that the Mahant did not spend the surplus for his personal use ~~xx~~ unconnected with his office.

It is important to note that Mukherjea, J., while considering the reasonableness of the restrictions under clause 6 of article 19 observed that the Mahant could not be made a mere servant of the state government by imposing all kinds of restrictions upon him. It is actually the duty of the Mahant to foster spiritual training by providing a competent line of teachers. He is not only a manager of the temporalities but a preacher of the religious tenets

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56. Commissioner Hindu Religious Endowments, Madras v. Sri Lakshmindra Tirtha Swamiar of Sri Shirur Mutt, AIR 1954 SC 282, 293.

of the Math to disciples and followers of the Math.

Mukherjea, J., said :

> "A Mahant's duty is not simply to manage the temporalities of a Math. He is the head and Superior of a spiritual fraternity and the purpose of Math is to encourage and foster spiritual training by maintenance of a competent line of teachers who could impart religious instructions to disciples and followers of the Math and try to strengthen the doctrines of the particular school or order, of which they profess to be adherents. This purpose cannot be served if the restrictions are such as would bring the Mathadhipati down to the level of a servant under a State department. It is from this stand point that the reasonableness of the restrictions should be judged."[57]

Another important departure made by the Act was the appointment of a manager for the Math. Section 56 of the impugned Act empowered the Commissioner to call upon the trustee to appoint a manager for the administration of the secular affairs of the institution, and in default of such appointment, to make the appointment himself. Such a manager would be drawing his salary from the Math funds and would be acting under the Act. In this way indirectly, the Act provided for the taxing of religious institutions for secular purposes. But the Court disapproved of this and declared the section invalid as violating article 26(d) of the Constitution. The Court reasoned that every religious denomination was entitled under article 26(d) to

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57. *Id.*, at 289.

administer its properties in accordance with law[58] and there was no justification for giving to the Commissioner unlimited power to appoint the manager.[59]

(ii) Tax Exemptions.

The exemption of religious activities from taxes has posed a constitutional problem in the United States. In India the position is different on account of article 27. Here the state has even been allowed to pay huge sums of money as grants to certain religious institutions.[60] The contribution of certain state governments to funds meant purely for religious purposes have been held to be constitutional.[61] In the United States, the problem is

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58. "It should be noticed that under Art. 26(d), it is the fundamental right of a religious denomination or its representative to administer its properties in accordance with law; and the law, therefore, must leave the right of administration to the religious denomination itself subject to such restrictions and regulations as it might chose to impose.

"A law which takes away the right of administration from the hands of a religious denomination altogether and vests it in any other authority would amount to a violation of the right guaranteed under cl.(d) of Art. 26."

Ibid, at 291.

59. "(T)his power can be exercised at the mere option of the Commissioner without any justifying necessity whatsoever and no prequisites like mismanagement of property or maladministration of trust funds are necessary to enable the trustee to exercise such drastic power."

Ibid, at 293.

60. See, e.g. article 290-A.

61. See Sri Jagannath Ramanuj Das v. State of Orissa, AIR 1954 SC 400, 403.

being discussed at present on theoretical level only and the courts have not so far accepted the contention that the exemption being an aid to religion would be invalid under the establishment clause of the First Amendment. On the one hand, the establishment clause provides that the state should not aid any religion, and on the other, the free-exercise clause guarantees religious liberty to every individual. The tax exemption is, no doubt, an aid to established religion and is conveniently called exemptory aids as distinct from affirmative financing to religious denominations. This exemptory aid might be divided into direct and indirect aids. The former includes exemptions of church buildings and properties connected therewith and residences meant for the clergy etc.[62] The latter includes church-operated institutions, e.g., church hospitals and other welfare organisations meant for the relief of the poor. Though both these types of institutions get exemptory aid, on ideological grounds, the attack on the first is more intense than on the second. We shall first

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62. In the United States the properties exempted from taxes are required to be exclusively used for religious purposes and they should be owned by a religious institution. The 'religious purpose' includes the actual houses of religious worship as also the adjoining properties necessary for such a purpose. Consequently, the tax exemption is allowed, along with the actual house of worship, to play-grounds, church cemeteries, the accompanying foliage and roads of the cemetery grounds, and even to residential quarters of clergy and other personnel. The above exemption has been made usually either through state constitutions or legislations.

consider the indirect exemptory aid to religion.

Those who justify the state aid through tax exemption for welfare schemes say that by exempting the hospitals and other welfare organisations, the government discharges indirectly its own function of a welfare state. A number of state courts in the United States, while holding the tax exemption constitutional, have justified their stand on the ground that hospitals and other welfare organisations exist more for a secular purpose rather than religious.[63] They say that these institutions serve purposes for which public money would otherwise have to be spent. As a matter of fact, they do not preach religious doctrines but carry on relief work. Several unsuccessful attempts were made to get the opinion of the state courts reversed by the Supreme Court of the United States.[64] In _First Unitarian Church of Los Angeles v. County of Los Angeles_,[65] the state of California exempted the real property used solely for religious worship. But it also required that the denomination claiming relief should take an oath of loyalty to the state. The petitioner church asserted that the requirement of oath was a restriction

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63. See, e.g., _Scripture Press Foundation v. United States_, 285 F 2d 800 (certiorari denied by the U.S. Supreme Court, 368 US 985 (1963).

64. _General Finance Corporation v. August Archetto_, 369 US 423 (1962), _Heisey v. County of Alameda_, 352 US 921 (1956).

65. 357 US 545 (1958).

on the freedom of religion and of speech guaranteed by the First Amendment. Though the state courts upheld the legality of such requirement, the United States Supreme Court reversed on the ground that it infringed the First Amendment

The tax exemption for welfare schemes have been criticised as an aid to organised religion. It may be argued that in the present state of affairs when even moral and ethical teaching is equated with religious teaching,[66] any aid whether direct or exemptory should as a matter of law be regarded as unconstitutional. It could be said with some justification that even a hospital run by a religious organisation might have a religious leeway and might amount to aid to religious institution which has sponsored it. The members of the staff might belong to the particular religious sect and exercise an imperceivable influence.[67] According to Prof. Paul G. Kauper all such aid, even if it is only exemptory, forms a partial union and mutual obligation between church and state which results in the loss of integrity on both sides. He further holds that this aid may become a bargaining lever by

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66. E.g., see United States v. Daniel Andrew Seeger, 380 US 163 (1965).

67. Symposium, Financial Aid to Religion, 61 Northwestern University L.Rev. (1966), 777, 789.

which government can achieve "cooperation" and assistance from the church on its political programme.[68]

As to the exemption of church properties or the so-called direct exemptory aid to religion, it has been criticised more vehemently as being a clear violation of the establishment clause. In a secular state, the government is not expected to aid any religion. However, as a matter of fact the exemptions have been allowed both in India and the United States to religious institutions from property and income taxes.[69] Further the exemption is allowed to the properties or incomes which have a direct concern with religion, e.g., religious preaching, ceremonies, buildings and other activities.

Those who favour these concessions argue that they are valid in the interests of the welfare of the state. It is assumed that the state is under a duty to impart moral instruction to its people. The religious institutions carry out this activity of the state and the state thereby saves money which it would otherwise have to spend. The tax exemption is only a negligible aid in this direction. Both India and the United States are called secular

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68. Kauper, The Constitutionality of Tax Exemptions for Religious activities, The Wall Between Church and State, (1963) 95, referred to in Symposium, Ibid.

69. Legislation is in the offing in the United States to the effect that churches should pay taxes on income earned from business they own or operate. Time (Time-Life International, Netherlands), May 2, 1969, (Asia ed.), pp.48-9.

states but the governments of these countries are not antigonistic to religion. Both of them recognise religion and its different aspects.[70] To quote the Supreme Court of Rhode Island :

> "Devotion to the great principle of religious liberty should not lead us into a rigid interpretation of the constitutional guarantees that conflicts with the accepted habits of our people."[71]

When we examine these direct exemptory aids to religion under the Constitutions of the United States and India, we come to different conclusions. In India, when article 27 says,

> "(n)o person shall be compelled to pay any taxes, the proceeds of which are specifically appropriated in payment of expenses for the promotion or maintenance of any particular religion or religious denomination,"

it means that, a person can be compelled to pay taxes provided it is meant to give assistance to all the religions without discrimination. Article 290-A has even provided for direct financial aid to certain religious institutions. Moreover, Indian secularism is not based, as it is in the United States, on the theory of a wall of separation between church and state. Consequently, tax exemption of

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70. In Tessim Zorach v. Andrew G. Clauson, 343 US 306, 313 the Supreme Court observed that the United States is a nation whose people presuppose the existence of a Supreme being.

71. General Finance Corporation v. August Archetto, 176 A 2d 73, 78-79 (1961, Rohde Island) An appeal was dismissed by the U.S. Supreme Court for want of substantial federal question, 369 US 423 (1962). Quoted in symposium, Financial Aid to Religion, 61 Northwestern University L.Rev., 777, 792.

religious properties in India cannot be treated as unconstitutional. But in the United States the trend of modern thinkers is to treat this type of aid to religion as an infringement of the establishment clause. As early as 1880, in the Iowa state legislature, tax exemptions were opposed on constitutional grounds.[72] Since the decisions given in the Everson[73] and McCollum[74] cases, tax exemption is considered by some as a violation of the establishment clause.[75] The declaration made by the Zorach[76] case that "The First Amendment... does not say that in every and all respects there shall be a separation of Church and

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72. In a petition, submitted to the legislature for elimination of tax exemption on church property, it was stated that, "the state is assisting to support sectarian religion, which is unconstitutional and foreign to the purpose for which our government was formed..." Iowa State Register, Feb. 1, 1880 quoted in Paulson, Monrad G., Preferment of Religious Institutions in Tax and Labour Legislation, Law and contemporary problems 14, 144, 149 fn. 41 (1949).

73. Arch R.Everson v. Board of Education of the Town of Ewing, 330 US 1 (1947).

74. Illinois ex rel. McCollum v. Board of Education, 333 US 203 (1948).

75. See for a very careful study of the point discussed here, Note, Constitutionality of Tax Benefits Accorded to Religion, 49 Col. L.Rev., 968 (1949). See specially the following observations: "That a tax exemption is a direct aid to the beneficiary and a burden to remaining taxpayers is clear beyond question. It is also an apparently direct aid to religion which has seemingly been banned by the First and Fourteenth Amendment as construed in the McCollum and Everson cases." Note, Establishment of Religion by State Aid, Rutgers Law Review, 3, 115, p.122 (1949).

76. Tessim Zorach v. Andrew G.Clauson, 343 US 306 (1952).

State,"[77] however, does not mean that the tax exemption can be deemed as non-infringing the establishment clause. In this context it may be noted that the recent prayer cases[78] have held that merely a reading of prayer without comments violates the establishment clause. On the same reasoning, it could be argued that a direct exemptory aid is something more than a mere reading of the prayer. When the state imposes taxes upon the people in general and exempts religious property from taxation, it is really putting a little heavier load upon those who pay in order to benefit the religious institutions which are so exempted.[79] The state provides all its services including police, fire and health protections to the religious institutions although they contribute nothing for them. If the argument is taken that through these religious institutions the public at large is benefited, it could be challenged on the ground that a large number of persons do not patronise any religion, though they also pay the taxes of which only church members get the

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77. Tessim Zorach v. Andrew G.Clauson, 343 US 306, 312(1952).

78. Steven I.Engel v. William J.Vitale, 370 US 421 (1962); School District of Abington Township v. Edward Lewis Schempp, 374 US 203 (1963).

79. In Trustees v. State, Iowa 276, 283 (1877) it was argued that statutes which exempt taxation of religious profits, practically require contributions from the tax payers for the support of religious societies, since the exemption of their buildings from taxation necessitates a levy at a higher rate upon all other taxable property in the locality. See Note, Religious Liberty in the United States, 15 col. L.Rev. 704 (1915).

benefit. There is also another point. The money saved by the religious institutions due to tax-exemptions is used in the promotion of religion while if there had been no exemption, the additional income would have gone to the state and benefited the people at large.[20]

Out of the two kinds of exemptory aid, direct and indirect, the direct aid seems to be a clear violation of the United States Constitution. So far as the indirect aids are concerned, e.g., aids to hospitals and other public welfare schemes, they are valid on the ground that they render service to the public in general. But the tax exemptions of religious institutions which maintain schools and impart religious instruction have no concern with general public welfare, and as such, it is submitted, violate the establishment clause. Since the Everson case,[21] which accepted the complete wall of separation theory, it seems that even exemptory aid to institutions engaged in religious worship or carrying on religious propaganda may be unconstitutional. The recent prayer cases reinforce this view.

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20. Doubts have been expressed in various quarters that such direct exemptory aid is unconstitutional, see, Alstyne, Arvo Van, Tax Exemption of Church Property, 20 Ohio St. L.J. 461 (1959), Comment, State Tax Exemptions and the Establishment Clause, 9 Stan. L.Rev. 366, 374-5 (1957), Symposium, Financial Aid to Religion, 61 Northwestern University L.R., 777, 792-3 (1966), Stimson, The Exemption of Property from Taxation in the United States, 18 Minn. L.Rev. 411, 416(1934); Zollman, Tax Exemptions of American Church Property, 14 Mich. L.Rev. 646, 647-48 (1916).

21. Arch R. Everson v. Board of Education of the Township of Ewing, 330 U.S. 1 (1947).

Chapter III

State Aid to Religious Organisations

A large number of religious institutions are useful to society in different ways and deserve support from the state. But secularism implies that the state should not take sides in matters of religion, that is, prefer or foster one religion as against the other. Nevertheless for a variety of reasons the separation of religion and politics cannot be maintained rigidly. It is incontestable proposition that if religious institutions are essential to society they should be encouraged and assisted by the state.[1] The assistance from the state to religious bodies may be given either for purely religious purposes, or for secular activities undertaken by religious institutions. This assistance may take three forms :

(i) Assistance to religious organisations for purely religious purposes.

(ii) Assistance to charitable institutions run by religious denominations, e.g., hospitals, orphanages etc.

(iii) Assistance to denominational educational institutions.

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1. The Indian Constitution itself contains some provisions in this behalf: Article 16(5) excludes offices in connection with the affairs of any religious institution from the operation of article 16(1) & (2) relating to discrimination on the ground of religion. Article 28(2) contemplates the state itself managing educational institutions established under an endowment wherein religious instructions are to be imparted. Under Entry 28 of List III of the Seventh Schedule, both the Union and states have legislative competency in the matter of "Charities and charitable institutions, charitable and religious endowments and religious institutions."

(i) <u>Assistance to religious organisations for purely religious purposes.</u>

There is a conflict between the Indian and the United States Constitutions in respect of this type of assistance. In India, article 27 provides that no person shall be compelled to pay any taxes, the proceeds of which are specifically appropriated in payment of expenses for the promotion or maintenance of any particular religion or religious denomination. In other words the proceeds of taxes may be used for the benefit of religion and religious denominations provided there is no discrimination in giving aid to various denominational bodies and provided they are all treated alike in the matter of receiving of aid.[2] It follows that if any preferential treatment is given to a particular religious institution it might be found violative of the Constitution. In spite of this the Constitution was amended[3] in 1956[4] and article 290-A was added to provide

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2. *Sri Jagannath Ramanuj Das v. State of Orissa*, AIR 1954 SC 400.

3. The Rulers of Travancore and Cochin, while forming a united state had originally agreed to pay certain amount to the Travancore Devaswom Fund. Later, on the reconstitution of the new state of Kerala, it was proposed to continue with the existing arrangement by making payments to the Devaswom Fund from the Consolidated Fund of the state.
See, for details, the statement of Objects and Reasons, Gazette of India, 1956, Extraordinary, Pt.II-S.2, page 220.

4. Inserted by section 19 of the Constitution (Seventh Amendment) Act, 1956, with effect from 1.11.1956.

for huge sums of money out of the Consolidated Funds of certain states for the benefit of Hindu temples.[5] This amendment is open to objection. It is one thing to lay down rules for the better administration of a religious body, to appoint administrators and to allow salaries and other expenses to be met out of its funds;[6] it is another thing to make provision for the payment of a large sum of money to religious bodies out of the Consolidated Fund of the state. Obviously the aforesaid amendment of the Constitution was made to give assistance to a particular religion which is something which does not go hand in hand with secularism.

In a Madras case,[7] the state statute[8] provided for

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5. Art. 290-A says -
"A sum of forty-six lakhs and fifty thousand rupees shall be charged on, and paid out of, the Consolidated Fund of the State of Kerala every year to the Travancore Devaswom Fund; and a sum of thirteen lakhs and fifty thousand rupees shall be charged on, and paid out of, the Consolidated Fund of the State of Madras every year to the Devaswom Fund established in that State for the maintenance of Hindu temples and shrines in the territories transferred to that State on the Ist day of November, 1956, from the State of Travancore-Cochin."

6. For example, the Madras Hindu Religious and Charitable Endowments Act, 1951, (Mad. Act 19 of 1951) laid down these provisions.

7. Kidangazhi Manakkal Narayanan Nambudiripad v. State of Madras, AIR 1954 Mad 385.

8. The Madras Hindu Religious and Charitable Endowments Act, 1951, (Mad. Act 19 of 1951).

the establishment of a hierarchy of officers[9] in order to administer 'all religious endowments'.[10] The religious institutions covered by the Act were further required to pay the Government a contribution not exceeding 5 percent of their income for services to be rendered by the Government through those officers.[11] This amount was to form part of the Consolidated Fund of the State. The Government was required to pay salary to the officers appointed under the Act and to defray other expenses connected therewith out of the Consolidated Fund. The Court, while discussing these provisions, noted that in our Constitution there was no provision like the establishment clause in the American Constitution:

> "It must be noted that while Arts. 25 and 26 reproduce the law as enacted in the Second clause of the First Amendment, there is nothing in our Constitution which corresponds to the first clause therein. The inference is obvious that the framers of our Constitution were not willing to adopt in its entirety the theory that there should be a wall of separation between Church and State which the first clause of the First Amendment was interpreted to embody."[12]

The Court, therefore, held that the state was entitled to

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9. A Commissioner, some Deputy Commissioners, Assistant Commissioners and Area Committees were to be appointed.

10. Section 20 of the Act.

11. Section 76(1).

12. Kidangazhi Manakkal Narayanan Nambudiripad v. State of Madras, AIR 1954 Mad 385, 390.

raise money for the benefit of religious institutions and spend state money for the same. In the opinion of the Court this would not necessarily lead to the conclusion that the state by doing so was furthering the cause of any religion or religious denomination. In Sri Jagannath Ramanuj Das v. State of Orissa,[13] by section 49 of the Orissa Hindu Religious Endowments Act, 1939, a fund was constituted for which contribution was levied upon every Math or temple having an annual income exceeding Rs. 250. The state also contributed both by way of loan and grant to the fund. The levy of a contribution upon the Maths and temples as well as the contribution by the state were questioned. The Supreme Court rejected the petition on both the counts and held that the imposition was not a tax but a fee and therefore fell outside the prohibition contained in article 27. As regards the contribution by the state, the Court said that it was not made for fostering or preserving the Hindu religion or any denomination within it, but with a view to ensure that religious trusts and institutions, wherever they existed, were properly administered. The Court further observed that "as there is no question of favouring any particular religion or religious denomination, article 27 could not possibly apply."[14]

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13. AIR 1954 SC 400.

14. Id., at 403.

In the United States, the position is different. The establishment clause of the First Amendment,[15] restrains the Congress from making any law which has a tendency to foster or promote any religion.[16-17] Some state Constitutions, in the United States have, specifically prohibited the state from granting public funds or

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15. "Congress shall make no law respecting an establishment of religion..."

16. _Arch R. Everson v. Board of Education of the Township of Ewing_, 330 US 1 (1947).

17. This clause was extended to the states by the due process clause of the Fourteenth Amendment. Though this Amendment was adopted in 1868, the American courts could not decide for a number of years whether its due process clause could also be applied for the protection of the Bill of Rights guaranteed by the First Amendment against the action of the state. (See _William Malloy v. Patrick J. Hogan_, 378 US 1, 4, n.2, 1964). In 1922, the Supreme Court held that the First Amendment did not apply to state actions: _Prudential Insurance Company of America v. Robert T. Cheek_, 259 US 530, 543 (1922). It was the year 1925, when the United States Supreme Court admitted that the First Amendment guarantee could be applied against state actions: _Benjamin Gitlow v. People of the State of New York_, 268 US 652 (1925), a case on freedom of speech and press. It was applied in _Dirk De Jonge v. State of Oregon_, 299 US 353, 364 (1937) to freedom of assembly; in _Jesse Cantwell v. State of Connecticut_, 310 US 296, 303 (1940) to freedom of religion; in _Rose Staub v. City of Baxley_, 355 US 313, 321 (1957) to freedom of speech; and in _B.T. Shelton v. Everett Tucker_, 364 US 479, 485 (1960) and _Brotherhood of Railroad Trainmen v. Virginia Ex Rel. Virginia State Bar_, 377 US 1 (1964), to freedom of association.

property to religious bodies.[18] Even in those states where the Constitution does not specifically prohibit, the judicial interpretation of the establishment clause stands in the way. In Arch R. Everson v. Board of Education of the Township of Ewing,[19] Justice Black, writing for the majority, interpreted the establishment clause as prohibiting the state from making laws favouring "One religion" or "all religions."[20] In the same case Jackson, J., in his dissenting judgment, said that the state was precluded from granting any aid for religious purposes. According to him,

> "the effect of the religious freedom Amendment to our Constitution was to take every form of propagation of religion out of the realm of things which could directly or indirectly be made public business and thereby be supported in whole or in part at tax payers expense."[21]

Later in Tessim Zorach v. Andrew G. Clauson also Douglas, J.,

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18. E.g., Article IV, s.30 of the California ~~California~~ Constitution says :
"Neither the legislature, nor any county, ... shall ever make an appropriation, or pay from any public fund whatever, or grant any-thing to or in aid of any religious sect, Church, creed or sectarian purpose, or help to support or sustain any school, college, University, hospital or other institution controlled by any religious creed, church, or sectarian denomination whatever, nor shall any grant or donation of personal property or real estate ever be made by the State, or any city, city and county, town or other municipal Corporation for any religious creed, church, or sectarian purpose whatever..."

19. 330 US 1 (1947).

20. Id., at 15.

21. Id., at 26.

speaking for the Court, declared :

> "Government may not finance religious groups nor undertake religious instruction nor blend secular and sectarian education nor use secular institutions to force one or some religion on any person. But we find no constitutional requirement which makes it necessary for government to be hostile to religion and to throw its weight against efforts to widen the effective scope of religious influence."[22]

The above discussion shows that in the United States any direct monetary aid for religious purposes would amount to an infringement of the establishment clause.

(ii) <u>Assistance to charitable institutions run by religious denominations, e.g., hospitals, orphanages etc.</u>

Article 26 of our Constitution authorises religious denominations to establish and maintain charitable institutions.[23] There are numerous hospitals which are run by private charitable institutions connected with one religious denomination or other. Besides these there are other social welfare institutions like orphanages, asylums for the aged, widows and other helpless women etc. which are run by religious institutions.[24] The government does not

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22. *Tessim Zorach* v. *Andrew G. Clauson*, 343 US 306, 314 (1952).

23. "Subject to public order, morality and health, every religious denomination or any section thereof shall have the right to establish and maintain institutions for ... charitable purposes."
Art. 26(a).

24. In order to establish such welfare institutions a licence is necessary under the Women's and Children's Institutions (Licensing) Act, 1956 (Act 105 of 1956). The statement of objects and reasons states that the Act was necessary as a large number of bogus children's houses and orphanages were existing in the country and exploiting destitute women and children. Inhuman conditions prevailed in these institutions.

generally[25] manage institutions of this type but gives them financial aid. In giving financial aid the government is under an obligation not to discriminate between one institution and the other.

In the United States, there are numerous charitable institutions under the control of religious denominations. Some of them are also run by non-religious bodies. Both of them get substantial aid from the government. The question has arisen as to the validity of such aids particularly in the case of institutions of the former type because of the establishment clause of the First Amendment. In _Joseph Bradfield v. Ellis H. Roberts_[26] the Federal Government had entered into a contract to erect a building on the property of the Providence Hospital in Washington. The Government had further agreed to pay a specified sum of money for each poor patient sent by the Commissioners of the District of Columbia to the hospital.

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25. Recently, however, statutory protective homes for women and children under the Suppression of Immoral Traffic in Women and Girls Act, 1956 (Act 104 of 1956) and the Children Act, 1960 (Act 60 of 1960) have been set up.

26. 175 US 291 (1899).

Joseph Bradfield, a tax-payer, brought a suit to restrain the Federal Government from giving effect to the agreement on the ground that it violated the establishment clause. The hospital belonged to a corporation consisting exclusively of Catholic Sisters of Charity. The Corporation itself was an entity separate and distinct from the church and was incorporated by an Act of the Congress. The Court, by a unanimous opinion, rejected the plea of the complainant and held the contract constitutional. The Court held that the hospital being run under a corporation on non-sectarian and secular principles must not be taken to be a religious body simply because the individuals who composed the corporation happened to be the members of a particular religious denomination. Peckham, J., delivering the judgment said:

> "(T)he fact that its (hospital's) members... are members of a monastic order of sisterhood of the Roman Catholic Church, and the further fact that the hospital is conducted under the auspices of said church, are wholly immaterial, as is also the allegation regarding the title to its property... The facts ... do not in the least change the legal character of the hospital, or make a religious corporation out of a purely secular one as constituted by the law of its being...
>
> "There is no allegation that its hospital work is confined to members of that church or that in its management the hospital has been conducted so as to violate its charter in the smallest degree. It is simply the case of a secular corporation being managed by people who hold to the doctrines of the Roman Catholic Church, but who nevertheless are managing the corporation according to the law under which it exists."27-28

According to the Court since there

27-28. Joseph Bradfield v. Ellis H. Roberts, 175 US 291, 298-9 (1899).

In an Illinois case,[31] financial assistance given to a Catholic welfare institution for children was upheld in spite of the fact that the state Constitution had prohibited any aid to a church or for a sectarian purpose. The main reasoning behind the Court's opinion was that the aid granted to the institution was "less than the cost of food, clothing, medical care, and attention and education and training in the useful arts and domestic science."[32]

In *Sargent v. Board of Education*,[33] the state funds were allotted to denominational orphan asylums in the face of the prohibition in the New York state Constitution for the payment of public funds to any denominational school or institution of learning. The New York Court of Appeals upheld the validity of the aid holding

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31. *Dunn v. Chicago Industrial School*, 280 Ill 613, annot. 22 ALR 1319, 1321-2 (1917).

32. The reasoning has been criticised on the ground that its acceptance "would permit state payment of the costs of secular education in parochial schools, as long as the sums paid are less than the amounts necessary to provide secular education for the affected children if they were to attend public schools."
Pfeffer, Leo, *Church, State and Freedom* (1953, Beacon Press, Boston), p.174.

33. 177 NY 317, 69 NE 722, annot. 8 ALR 866, 881 (1904).

that an orphan asylum was not an educational institution.

In India, the rule of financing such institutions has been in existence since long. If the state gives financial assistance out of the public money it has power to exercise control over its proper expenditure.

(iii) Assistance to denominational educational institutions.

Traditionally, organised education throughout the western world including American states was religious education. Even in Protestant countries like England, the basis of education was largely Bible. In India too the religious institutions, both of Hindus and Muslims, imparted education to the people in their institutions. Gradually the state started providing financial assistance with increasing supervision. On account of backwardness and illiteracy in the country, the Indian Constitution laid stress upon the educational development of the masses. There are several articles in the Constitution by way of directive principles of state policy which lay down the role which the state should play in this respect.[34] In order to

34. "The State shall, within the limits of its economic capacity and development, make effective provision for securing the right... to education..."
Art. 41.
"The State shall endeavour to provide, within a period of ten years from the commencement of this Constitution, for free and compulsory education for all children until they complete the age of fourteen years.
Art. 45.
"The State shall promote with special care the educational and economic interest of the weaker sections of the people and, in particular, of the Scheduled Castes and the Scheduled Tribes, ..."
Art. 46.

spread literacy it is necessary that the state should make use of all mediums, both public and private, including denominational educational institutions, to educate the people at large. Education in the present state of affairs is a costly affair and no religious or even non-sectarian institution in India has adequate resources to carry on its policy of educational development unaided by the state. Article 29 provides that the minorities should have the right to conserve their language, script and culture. [35] Article 30 authorises them "to establish and administer educational institution of their choice."[36] In order to strengthen all educational

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35. "Any section of the citizens residing in the territory of India or any part thereof having a distinct language script or culture of its own shall have the right to conserve the same." Art. 29(1).

36. "All minorities, whether based on religion or language, shall have the right to establish and administer educational institution of their choice." Art. 30(1).

institutions, whether private or public, the government gives them substantial grants by way of aid. These grants are given to denominational institutions also. Clause 2 of article 30 directs the state that in granting aid it should not discriminate against any educational institution on the ground that it is managed by a religious denomination.[37] This article is complementary to article 26 which authorises a religious denomination to establish institutions for charitable purposes. The state gives direct as well as indirect aid to all denominational educational institutions. In order to discuss their constitutionality both types of aid are taken separately.

(a) Direct aid to Denominational Educational Institutions:

It seems that in the United States no direct aid is given to educational institutions if they are run by

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37. "The State shall not, in granting aid to educational institutions, discriminate against any educational institution on the ground that it is under the management of a minority, whether based on religion or language."
Art. 30(2).

religious denominations.[38] Most of the state constitutions explicitly prohibit the appropriation of public money to schools controlled by religious organisations.[39] Attempts made to amend the Federal Constitution to prohibit the use of public funds for parochial schools have been unsuccessful.[40] Arch R. Everson v. Board of Education of the Township of Ewing[41] has, however, laid down the principle that any aid by the state to religion would be an establishment of religion proscribed by the establishment clause.[42] The theory of a 'wall of separation' enunciated by President Jefferson stood in the way of

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38. In a recent case, seven tax payers claimed that more than three pence of their tax money was involved in a federal aid -to- education programme that was being paid for tutoring in parochial schools. Though the federal Court had dismissed for lack of "standing" of a general taxpayer, the U.S. Supreme Court by an 8 to 1 decision remanded the case for rehearing. In re Florence Flast, Time (Asia Edition), June 21, 1968, p. 81.

39. At least 37 out of 46 state Constitutions have prohibited such help. See, Note, Catholic Schools and Public Money, 50 Yale L.J. 917.

40. President Grant recommended an amendment forbidding the teaching of sectarian doctrines in any school supported wholly or in part by public money. 4 Cong. Rec. (Part 6) 5190, 5595 (1876). Referred to in Note, Catholic Schools and Public Money, 50 Yale L.J. 917, 921, fn. 27.

41. 330 US 1 (1947).

42. Id., at p.15.

giving direct aid to parochial schools.[43]

In India the direct aid permitted under the Constitution has created its own problem of governmental control over such aided institutions. The state claims that if it gives aid to them it has a right to interfere in the management of the institutions, while the institutions claim the constitutional guarantee of the right to establish and maintain educational institutions without interference and to receive financial aid without discrimination.

The propriety of government interference in the management of aided schools arose in 1957 in the Kerala Education Bill case.[44] The Bill sought to lay down rules for the better management of all aided educational institutions.[45] The managers of certain schools maintained by

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43. In Arch R. Everson v. Board of Education of the Township of Ewing, 330 US 1 (1947), a provision for free transportation to school children including parochial school children, was held constitutional as an indirect aid by a 5 to 4 majority by the U.S. Supreme Court. The dissenting judges, however, were critical to all types of aids to the parochial schools. For them there is a complete wall of separation between the church and the state under the U.S. Constitution and even an indirect aid would be invalid.

44. In re the Kerala Education Bill, 1957, AIR 1958 SC 956.

45. Clause 3(5) of the bill envisages that if any school would be established otherwise than in accordance with the provisions of the Bill, it was not entitled to be recognised by the Government. Cl.8(3) provided for that all fees collected from the students in an aided school should be deposited with the Government. Cl.9 provided for the payment of salaries to teachers in the aided schools. Cls. 10,11&12 authorised the Government to prescribe qualifications of teachers in aided schools and conditions of their service. Cls. 14&15 provided for taking away the institution by the Government in case of mismanagement.
Id., at pp. 967-8.

certain religious minorities represented before the Supreme Court that the Bill was an infringement of their rights guaranteed under article 30(1) of the Constitution. The state of Kerala, on the other hand, defended the Bill on the ground that so long the institutions did not receive any aid from the state the minorities had a right to establish and maintain their educational institutions within the meaning of article 30(1) of the Constitution, but if they were recipient of any aid from the state they had to abide by the terms of the aid provided there was no discrimination. The Supreme Court rejected the extreme arguments on both sides and held that notwithstanding the absolute terms of article 30(1) it was open to the state by legislation or even by executive direction to lay down reasonable rules and regulations governing the institutions receiving the aid.[46] But at the same time the legislative power of the state being subject to the fundamental rights could not be so exercised as to affect the fundamental right of the institutions to administer them as guaranteed by article 30 of the Constitution.[47]

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46. "It stands to reason, ... that the constitutional right to administer an educational institution of their choice does not necessarily militate against the claim of the State to insist that in order to grant aid the State may prescribe reasonable regulations to ensure the excellence of the institutions to be aided."

    In re the Kerala Education Bill, 1957, AIR 1958 SC 956, 983.

47. Ibid.

Recently in Rev. Father W.Proost v. The State of Bihar,[48] the question of the scope of article 30(1) was again raised from a different standpoint. A certain educational institution, known as St. Xaviers College established by the Christian Jesuits and affiliated to Patna University sought a declaration that it was a minority institution within the meaning of article 30(1). The object of founding the college was "to give Catholic youth a full course of moral and liberal education, by imparting a thorough religious instruction and by maintaining a Catholic atmosphere in the institution."[49] The college was, however, open to all non-Catholic students who also participated in the course of moral science. It was conceded by the state that the Jesuits, who had established the institution were the minorities, but it was contended that the protection of article 30(1) could not be availed of by the college in the instant case. It was argued that the protection of article 30(1) was available only if the institution was founded to conserve 'language script or culture' within the meaning of article 29(1). Since the college was open to all sections of the people and there was no programme of that kind the college did not qualify for the protection of article 30(1). The

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48. AIR 1969 SC 465.

49. Id., at 466.

Supreme Court rejected this argument and held that the scope of article 30(1) could not be limited by introducing in it considerations on which article 29(1) was based. The two articles were separate. Article 30(1) applied to all institutions established by minorities, whether to conserve language, script or culture or with any other object. The mere fact, that a minority community having established an educational institution of its choice admits members of other community, does not exclude it from the scope of article 30(1).[50] Referring to the earlier cases, In re the Kerala Education Bill, 1957, and Rev. Sidhraibhai Sabbai v. State of Gujrat,[51] the Court held that article 30(1) was not limited to the needs of a single community exclusively, but it grants minorities to establish educational institutions to cater "the educational needs of the citizens or sections thereof."[52] The Court quoted with approval the following passage from Rev. Sidhraibhai Sabbai v. State of Gujrat :

> "The fundamental freedom is to establish and to administer educational institutions: it is a right to establish and administer what are in truth educational institutions, institutions which cater to the educational needs of the citizens, or sections thereof."[53]

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50. Id., at 469.

51. In re the Kerala Education Bill,1957, AIR 1958 SC 956. Rev. Sidhraibhai Sabbai v. State of Gujrat, AIR 1963 SC 540.

52. Rev. Sidhraibhai Sabbai v. State of Gujrat, AIR 1963 SC 540, 545.

53. Rev. Father W. Proost v. The State of Bihar, AIR 1969 SC 465, 469.

In *State of Bombay v. Bombay Education Society*,[84] the state Government directed the respondent society, which controlled several English medium schools, not to admit pupils whose language was not English. In other words, these schools were directed to confine themselves to Anglo-Indians and other persons of non-Asiatic descent. The direction further required the society to make arrangements for progressively switching over to Hindi or any other Indian language. The Society and its directors filed writ petitions before the Bombay High Court impugning the government order. The High Court held that the order was bad in that it contravened the provisions of article 29(2). On appeal the Supreme Court affirmed the view adopted by the Bombay High Court. The Court assumed that the object of the order was undoubtedly a laudable one in that it was to promote advancement of the national language. Yet the Court said that the object was sought to be achieved by denying to all pupils, whose mother tongue was not English, admission into any school where the medium of instruction was English. Therefore the order offended the fundamental right guaranteed to all citizens by article 29(2). Regarding the direction for switching over to Hindi or any other Indian language, the Court observed that the minority has a fundamental right under article 29(1) to conserve its

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84. AIR 1954 SC 561.

language, script and culture, and has the right under article 30(1) to establish and administer educational institutions of its choice. Consequently, the Court held that the police power of the state did not extend to determine the medium of instruction in an educational institution.

In Arya Pratinidhi Sabha, Patna v. The State of Bihar,[85] the Patna High Court observed that the guarantees in articles 29(1) and 30 were not absolute and the state could impose regulations for the maintenance of discipline and standard of efficiency, and to safeguard "public order, morality or health."[86] In the recent case of Dinendra Nath Sarkar v. State of Bihar,[87] again the same High Court expressed a similar view that the government could make reasonable restrictions in the interest of the general public.

The question of interference with the management of the educational institutions established by a denominational minority arose again before the Supreme Court in the unreported case of Rev. Bishop S.K. Patro v. State of Bihar.[88] There the state Government acting under the Bihar High School (Control Regulation of Administration) Act, 1960,

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85. AIR 1958 Pat 359.

86. Id., at 365. Presumably these limitations refer to article 26(a). See also In re Kerala Education Bill, 1957, AIR 1958 SC 956, to the effect that the right to administer does not extend to the right to maladministration.

87. AIR 1963 Pat 54.

88. Rev. Bishop S.K. Patro v. State of Bihar, C.A. No.2346 of 1968 decided on 2.4.69 by the Supreme Court of India, AIR 1969 NSC 16.

framed certain rules relating to the constitution of managing committees of schools. Acting under the rules so framed, the Education Department of the state Government disapproved the constitution of the managing committee of a certain missionary church society which ran some missionary schools. It objected to the election of certain churchmen to the posts of presidentship and secretaryship of the society and directed the reconstitution of the managing committee. The Patna High Court could not find any invalidity in the order of the government department directing the reconstitution of the committee. It was of the opinion that because the members of the Church Missionary Society of London who had established the school in India were not the citizens of India and were aliens, therefore the school was not an institution established by minority within the meaning of article 30(1). On appeal, the Supreme Court reversed. It held that the school was actually taken over by the local Christians. The mere fact that the school received substantial assistance from the Church Missionary Society of London did not alter its character as an educational institution established by minority. The Court, however, noted that article 30(1) did not confer upon foreigners the right to set up educational institutions of their choice. Persons setting up educational institutions must be residents in India and they must form a well-defined religious or linguistic minority. As to the constitution

of the managing committee the Court held that if the government were allowed to interfere it "would mean whittling down rights of minority community guaranteed under the Constitution."

This matter also arose in Rev. Sidhrajbhai Sabbai v. State of Gujrat[59] and M.R. Balaji v. The State of Mysore.[60] In the former, a Christian Society, the Gujrat and Kathiawar Presbyterian Joint Board had been running several primary schools in the Gujrat state including a Training College for teachers. This College was getting Rs.8,000 by way of an annual grant under the Education Code of the state Government. The Education Department held examinations and granted certificates to teachers trained in the college. From 1959 the state Government began to interfere in matters of admission in all the privately run training colleges in order to increase the number of trained teachers in the state.

Originally, in 1952, 60 per cent of the total number of seats in these colleges were reserved by the Government for its nominated candidates. At that time some compromise was entered into between the Society and the Government under which the Society undertook to train a certain number of teacher students. Later on, in 1955, the Government issued an order directing that 80 per cent of seats in the Training College should be reserved for the nominees of the

59. AIR 1963 SC 540.

60. AIR 1963 SC 649.

Government and threatened that disobedience of the order would involve the withdrawal of the grant and of the recognition to the Training College. This was justified by the Government on the ground that there were about 40,000 untrained primary teachers in the state and it was necessary that they should get the necessary training at the earliest. With this end in view, the Government opened several new training colleges and directed, as aforesaid, the reservation of 80 per cent seats in the non-Government training colleges. The Society showed its inability to comply with the direction and declined to admit the students within the quota fixed by the Government. On this refusal, the Government informed the Society that the grant would not be paid to the college unless they agreed to reserve 80 per cent seats for Government nominees. Next year the Government further directed that the college students should be allowed to observe important festivals of all religions not "involving rituals as part of cultural programmes under community living," and that the college should provide some common place where all teachers, staff and students could meet and recite common prayers. As the Society failed to implement all these directions including the admission of 80 per cent Government nominated candidates, the annual grant was suspended.

It was an admitted fact that the petitioners were members of a religious denomination which constituted a

religious minority. They claimed protection under articles 30(1), 26(a) and 19(1)(f) & (g) of the Constitution. The Supreme Court found that in so far as articles 19 and 26 were concerned they were not infringed. As to article 19(1)(f), which guarantees all citizens the right to acquire, hold and dispose of property, the Court relied upon its earlier decision in Commissioner, Hindu Religious Endowments, Madras v. Sri Lakshmindra Tirtha Swamiar of Sri Shirur Mutt[61] and Sri Dwarka Nath Tewari v. State of Bihar.[62] The Court opined that the property in article 19(1)(f) must be extended to all those recognised types of interest which have the insignia or characterstics of proprietary rights. But in the instant case the Court held that no attempt was made by the order of the state to deprive the petitioners of their right to property, and therefore the fundamental freedom guaranteed by article 19(1)(f) of the Constitution was not violated. So also the Court held that the right of the petitioners under article 19(1)(g) to practise any profession or to carry on any occupation, trade or business was not infringed. Regarding article 26(a) the Supreme Court held that it conferred on religious denominations a right to establish religious and charitable institutions and in

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61. AIR 1954 SC 282.

62. AIR 1959 SC 249.

a larger sense an educational institution might be regarded as charitable. But in the view which the Court took of article 30(1) it found it unnecessary to consider the case further under article 26. The Court said that the order passed by the Government made serious inroads on the rights vested in the Society to administer the Training College. Article 30(1) provided that all minorities had the right to establish and administer educational institutions of their choice. Article 30(2) did not derogate from article 30(1) and could not support the inference that state was otherwise competent to discriminate so as to impose restrictions upon the substance of the right to establish and administer educational institutions by religious or linguistic minorities. Holding that regulatory measures could be enforced by the state under article 30(1) the Court compared this article with article 19 under which reasonable restrictions can be placed on the fundamental rights of citizens. The Court said :

> "Unlike Art.19, the fundamental freedom under clause (1) of Art. 30, is absolute in terms: it is not made subject to any reasonable restrictions of the nature the fundamental freedoms enunciated in Art.19 may be subjected to. All minorities, linguistic or religious have by Art. 30(1) an absolute right to establish and administer educational institutions of their choice; and any law or executive direction which seeks to infringe the substance of that right under Art. 30 (1) would to that extent be void. This, however, is not to say that it is not open to the State to impose regulations upon the exercise of this right.... Regulations made in the true interests of efficiency of instruction, discipline, health, sanitation, morality,

public order and the like may undoubtedly be imposed. Such regulations are not restrictions on the substance of the right which is guaranteed: they secure the proper functioning of the institutions, in matters educational."[63]

Accepting the contention of the petitioners that the regulations made by the Government could only be in the interest of the institution and not in the interest of the outsiders the Court further said :

"Restrictions imposed by the Rules and the directions issued upon the right of the society to administer Training College maintained by it, are manifestly not conceived in the interests of the College....
"The right established by Art. 30(1)... is intended to be a real right for the protection of the minorities in the matter of setting up of educational institutions of their own choice. The right is intended to be effective and is not to be whittled down by so-called regulative measures conceived in the interest not of the minority educational institution, but of the public or the nation as a whole. If every order which while maintaining the formal character of a minority institution destroys the power of administration is held justifiable because it is in the public or national interest, though not in its interest as an educational institution the right guaranteed by Art. 30(1) will be but a teasing illusion, a promise of unreality. Regulations which may lawfully be imposed either by legislative or executive action as a condition of receiving grant or of recognition must be directed to making the institution while retaining its character as a minority institution effective as an educational institution. Such regulation must satisfy a dual test - the test of reasonableness and the test that it is regulative of the educational character of the institution and is conducive to making the institution an effective vehicle of education for the minority community or other persons who resort to it."[64]

Applying these tests the Court found that in so far as the

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63. Rev. Sidhrajbhai Sabhai v. State of Gujrat, AIR 1963 SC 540, 545.

64. Id., at 546-7.

reservation of 80 per cent seats for Government nominees was concerned, it was an unreasonable restriction, and was not conducive in the interest of the minority community. These considerations led the Court to allow the petition and to hold that the 80 per cent reservation rule violated article 30(1) of the Constitution.

In M.R. Balaji v. The State of Mysore,[65] the Mysore Government by its order reserved 68 per cent seats in certain technical colleges of the state for certain specified backward classes. The Supreme Court found the reservation violative of article 15(2) of the Constitution and accepted the contention of the petitioners that the action of the state in issuing the said order amounted to a fraud on the constitutional power conferred on the state by article 15(4).[66] The Court pointed out that the Government could provide a reasonable reservation for the advancement of the weaker elements of the society, but if the state fixed unduly a large number of seats for them, it would be excluding the rest of the society and thus would be violative of the Constitution.[67] In a later case,[68] where only 48 per cent seats were reserved for the backward classes and

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65. AIR 1963 SC 649.
66. Id., at 663.
67. Id., at 662.
68. R. Chitralekha v. State of Mysore, AIR 1964 SC 1823.

Scheduled Tribes, the reservation was found to be constitutional.

These cases have highlighted the problem of the extent to which the control can be exercised on educational institutions getting grants from the state. They also raise the question of relationship between articles 26(a), 29(2), and 30(1) and 30(2). In all these cases, it has been admitted that in spite of the absolute terms of article 30(1), the state is free to impose reasonable regulations by legislative or executive action in the interests of efficiency, health and so forth. Article 30(1) is an article supplementary to article 26(a).[69] Article 26(a) guarantees every religious denomination the right to establish and maintain a charitable institution and the state is given power to control it on grounds of public order, morality and health. The Supreme Court in the Kerala case,[70] while admitting that there was an interference by the state, upheld the action of the Government as reasonable one as it benefitted the ill-paid teachers engaged in rendering service to the nation and also protected the backward classes.[71] Now article 29(2) lays down a rule of non-discrimination in admission to educational institutions on grounds only of religion and language. Article 30(1)

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69. While article 26(a) guarantees to a minority the right to establish religious and charitable institutions, article 30(1) guarantees the minority the right to establish its own educational institutions.

70. In re the Kerala Education Bill, 1957, AIR 1958 SC 956.

71. Id., at 983.

guarantees the minorities to establish and administer educational institutions of their choice. Article 30(2) imposes the rule of non-discrimination in giving aid to an "educational institution on the ground that it is under the management of a minority, whether based on religion or language." The question naturally arises as to how the inconsistency between articles 29(2) and 30(1) could be resolved? Has the government no power to regulate admissions consistent with article 29(2) in educational institutions established under article 30(1), in case they get aid out of the state funds? Is a regulation made by the state in order to implement the directive principles of state policy of articles 41, 45 and 46[72] in the national and public interest, not a reasonable restriction upon the right of the minority guaranteed under article 30(1)? What do we expect of a democratic Constitution ? Can the right of the minority become so sacrosanct that it cannot be touched even for the enforcement of the national educational policy and in particular for the betterment of backward children? Suppose, a minority - say the Christians, who are educationally advanced community, establish an educational institution and receive government grant. Suppose, further, that such an institution receives applications for admission from non-Christians who are better qualified

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72. Supra n. 34, p.79.

than Christian applicants. Can they be refused admission in order to protect the interest of the minority community based on religion ? Would not that be a violation of article 29(2) which says that educational institutions getting government grant should not discriminate on grounds only of religion and caste ? Is it not conceivable that the applicants belonging to minority community for whose benefit the institution has been established in pursuance of the right conferred by article 30(1) may be rejected as inferior to other applicants belonging to other communities? Then, where does lie the guarantee of article 30? In the Kerala case, it was held that article 29(2),

> "contemplate(s) a minority institution with a sprinkling of outsiders admitted into it. By admitting a non-member, the minority institution does not shed its character and cease to be a minority institution."[73]

In Rev. Father W.Proost v. The State of Bihar,[74] the Attorney General, placing reliance on the word 'sprinkling', had contended that the minority should establish an institution for itself and not for others. Rejecting this view the Supreme Court quoted with approval its earlier opinion in Sidhrajbhai case[75] that the minority had a right to establish institutions which might cater to "the educational needs of the citizens or sections thereof."[76] But this view

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73. In re the Kerala Education Bill, 1957, AIR 1958 SC 956, 978 (Emphasis added).
74. AIR 1969 SC 465.
75. Rev. Sidhrajbhai Sabbai v. State of Gujrat, AIR 1963 SC 540.
76. Rev. Father W.Proost v. The State of Bihar, AIR 1969 SC 465, 469.

does not fit in with the view adopted in the *Kerala* case[77] as also with the guarantee of articles 29 and 30. It may be noted that in *Champakam* case[78] the Madras Government had desired to admit students of all communities according to a number fixed in proportion to the people belonging to different communities living in the state. Brahmins, who were more qualified, naturally felt aggrieved because non-Brahmins of poor abilities were admitted. The Supreme Court rejected the Government's contention that it could prescribe proportionate representation to all the people of the state. On similar grounds, in any other educational institution set up by a minority the same difficulty may arise if the applicants belonging to other communities are allowed admission and members of the community for which and by which the institution has been opened are denied admission if they do not come up to the standard of the other applicants.

It is necessary, therefore, to lay down a rule which is consistent with various articles of the Constitution relating to educational institutions. It is submitted that a reasonable solution would be to allow the educational institutions established by the minorities to give some preference to their community even though they might receive

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77. *In re the Kerala Education Bill, 1957*, AIR 1958 SC 956.

78. *State of Madras v. Smt. Champakam Dorairajan*, AIR 1951 SC 226.

grant from the government. But such aided institutions should admit the majority of the students on grounds of merit only and not on the ground of religion and language. The backwardness of a particular community can be taken into consideration for these purposes.

(b) Indirect Aid to Denominational Educational Institutions.

It has been seen above[79] that in the United States direct aid is not given because of the establishment clause. In India, however, there is no such constitutional bar.[80-1] In the United States, indirect aid to educational institutions appears to be permissible though a contrary

79. The text accompanying fn. 58, supra p.81.
80-1. See articles 27 and 30(2) of the Constitution.

opinion has also been expressed.[82] This indirect aid is given mainly in the shape of book aid and transportation facilities. Apart from these two major aids, indirect assistance by way of mid-day meal or laboratory amenities is often also provided.[83] The American government makes huge grants by way of aid to parochial and non-parochial educational institutions for the construction of dormitories and for other amenities. Such aids do not appear to be objectionable.[84] In a state Court case[85] the municipality provided salaries to the teachers of a Catholic school. The Indiana Supreme Court was unanimous in holding that such payments were not illegal. The technique adopted by the Catholic school was that it usually enrolled a large number of students and then afterwards notified the municipality that it was unable to

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82. Those who are critical of any aid to church controlled schools are Pfeffer, Leo, _Church, State, and Freedom_ (1953, Beacon Press, Boston), pp.466 et.set.; Gordon, _The Unconstitutionality of Public Aid to Parochial Schools_, in the Wall Between Church and State (1963); Konvitz, Milton R., _Separation of Church and State: The First Freedom_, Law and Contemporary problems, 14, p.44 (1949); Rosenfield, _Separation of Church and State in the Public Schools_, 22, U.Pitt. L.Rev (1961) 561; Slough, V. McAnany, _Government Aid to Church-Related Schools: An Analysis_, 11 Kau. L.Rev. (1962), 35.

83. _Financial Aid to Religion_, Symposium, 61 Northwestern University L.Rev. (1966), 777, 780.

84. Bach, Williams S., _Tuition Payments to Parochial Schools Violates Fourteenth Amendment_, 59 Mich. L.R. 1254, 1255 (1961).

85. _State ex rel. Johnson v. Boyd_, 28 NE 2d 256, (Ind. Sup. Ct. 1940), referred to in Notes, _Catholic Schools and Public Money_, 50 Yale L.J. 917 (1941).

run the school owing to the shortage of funds. In such a situation the municipality felt obliged to provide funds for the payment of salaries to teachers. It appears that the Court ignored that in such schools (1) only Catholic children were admitted; (2) all teachers were members of Catholic religious orders; (3) in each room the crucifix, holy water, and a picture of the Holy Family were furnished; and (4) non- compulsory religious instruction was given daily to all children.[86] However, the state Supreme Court found that the schools were "public" and not "parochial", and therefore payments were not unconstitutional. But the Vermount Supreme Court, in another case took a different view in a similar circumstance. Thus in _Swart v. South Burlingon Town School District_,[87] as the school district did not maintain a high school within its jurisdiction, it made payments to various high schools in which pupils of the district attended the class. The parents had the option to select any school whether they were parochial or non-parochial. Accordingly, the high schools

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86. Notes, _Catholic Schools and Public Money_, 50 Yale L.J. 917, 918 (1941).

87. 167 A 2d 514 (Vt. 1961), discussed in, Bach, William S., _Tuition Payments to Parochial Schools Violates Fourteenth Amendment, Recent decisions_, 59 Mich. L.R. 1254 (1961).

run by the Roman Catholic Church also received grant from the school district. The lower Court as also the Vermont Supreme Court held that the payment of tuition fee to a religious denominational school by a public body constitutes an "establishment of religion" and therefore it was illegal. The Court pointed out that as the religious affairs of the Catholic Church could not be separated from its educational instruction, the payment of tuition fee amounted to the financing of the teaching of the Catholic religion. It is difficult to distinguish the Vermont case from the one decided by the Indiana Supreme Court. In that case also, it is submitted, the payment of tuition fees was an establishment of religion and as such unconstitutional.

A new controversy has come up in the United States. It is said that as the education is compulsory, and as parochial schools are entitled to teach on terms of equality with public schools,[88] they have a right under the free exercise clause

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88. Walter M. Pierce v. Society of the Sisters of the the Holy Names of Jesus and Mary, 268 US 510 (1925).

to receive a proportionate share of government's aid.[89]
The denial of aid to them would amount to discrimination and infringement of the right guaranteed by the free exercise clause. In India this right is recognised in article 30(2). But the public opinion in the United States is different. Some writers urge that as far as possible the so called wall between the church and state should be maintained.[90] We shall now examine the propriety of some facilities which are provided by the state to denominational educational institutions.

<u>Book Facilities</u>.

The government both in India and the United States usually grants book aids to educational institutions. In India no objection can be taken even if the aid is given for the purchase of religious books.[91] But in the United States it would be regarded as an infringement of the establishment clause.[92] But any such aid given for text books of non-religious character to denominational educational

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89. Symposium, <u>Financial Aid to Religion</u>, 61 Northwestern University L.Rev. 777, 781 (1966).

90. See, for example, Kurland, <u>Of Church and State and the Supreme Court</u> (1962).

91. Because of article 27, so long there is no discrimination.

92. Symposium, <u>Financial Aid to Religion</u>, 61 Northwestern University L.Rev. (1966), 777, 780.

institutions would be non-violative of the Constitution. Actually several states in America have provided for the supply of secular text books to parochial schools out of funds raised by taxation. There is, however, a conflict amongst the different state courts in this matter. The matter was raised in 1922 before the Court of Appellate Division in the New York state.[93] In that case the Court, rejecting the plea of child-benefit, held that even book aid should be deemed to be an aid to the religious institution and therefore invalid. The Court rejected the argument that the books supplied for the use in the parochial schools were simply handed over to the pupils for their use. The supply of books was an indirect aid to the schools.[94]

In 1929, the Supreme Court of the Louisiana state, in a similar case gave a contrary opinion.[95] The Court accepted the child-benefit theory and held that the beneficiaries were actually children reading in the school and a benefit to the children was a resulting benefit to the

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93. Smith v. Donahue, 202 App Div 656, 195 NY Supp 715, annot. 67 ALR 1196, 1197-8 (1922).

94. Ibid.

95. Silas P. Borden v. Louisiana State Board of Education, 67 ALR 1183 (1929 La.).

state. The Court said :

> "True, these children attend some school, public or private, the latter sectarian or non-sectarian, and the books are to be furnished them for their use, free of cost, whichever they attend. The schools, however, are not the beneficiaries of these appropriations. They obtain nothing from them, nor are they relieved of a single obligation because of them. The school children and the State alone are the beneficiaries."[96]

Shortly afterwards the matter came up before the Supreme Court of the United States in _Emmett Cochran v. Louisiana State Board of Education._[97] That case arose not under the establishment clause but on a technical point. Whether the state could spend tax money for supplying books free of cost to the school children and whether such spending would not violate the Fourteenth Amendment which provided that the state laws could not deprive a person of his property for a private purpose ? It was contended that the purpose was "to aid private, religious, sectarian and other schools not embraced in the public educational system of the state by furnishing text-books free to the children attending such private schools." But the Supreme Court rejected this argument and held that the book aid to school going children was not a private purpose. It accepted the

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96. _Id._, at 1191.

97. 281 US 370 (1930).

contention of the Board that aids were given for the benefit of the state. The Court took the view that so long as the book aid was given to all children of the state without discrimination it was an aid for the promotion of education and therefore valid. Hughes, C.J., delivering the opinion of the Court, concluded :

> "Viewing the statute as having the effect thus attributed to it, we cannot doubt that the taxing power of the state is exerted for a public purpose. The legislation does not segregate private schools or their pupils, as its beneficiaries, or attempt to interfere with any matters of exclusively private concern. Its interest is education, broadly; its method comprehensive. Individual interests are aided only as the common interest is safeguarded."[98]

Recently another case was brought before the United States Supreme Court.[99] The New York state required its public school boards to lend text-books to students in all private schools including religious schools. The members of the Board of Education for both Rensselaer and Columbia counties challenged the state directive as being repugnant to the establishment clause of the First Amendment. By a 6 to 3 decision the Supreme Court upheld the validity of the order of the state Government. For the majority of judges, the lending of text books was an aid to children

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98. *Id.*, at 375.

99. *In re Lending Text Books*, Time (Asia edition), June 21, 1968, p. 51.

and not to religion. White, J., delivering the majority judgment, said that so long as the public school board was required to lend secular books, there was no infringement of the establishment clause.

The three dissenting judges, Douglas, Fortas and Black, JJ., were critical of this approach. For them many books apparently secular might have religious overtones. By way of illustration they observed that subject like evolution could be treated both in secular and religious books. Black, J., criticising the majority judgment, said that on the child benefit theory, many kinds of help to parochial schools could be held to be constitutional. He illustrated :

> "It requires no prophet to foresee that on the argument used to support this law others could be upheld providing for funds to buy property on which to erect religious school buildings, to pay the salaries of religious school teachers and finally to pick up all the bills for religious schools."100

For him,

> "tax raised funds cannot constitutionally be used to support religious schools, even to the extent of one penny."101

Some writers on constitutional law are also critical of aids given to sectarian school children, even if such aid is only in the shape of text-books. Pfeffor is

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100. Ibid.

101. Ibid.

one of them.[102] Criticising the *Cochran* case,[103] he says that the logical result of the child-benefit theory would be to extend the field of state aid to such an extent that it might cover all the expenditure of the school. He points out :

"Both the Louisiana court and the United States Supreme Court stressed the fact that the text books supplied were not sectarian. But there is nothing unique in the non sectarianism of secular text-books; pens, note-books, black-boards, desks, and laboratory equipment are likewise non-sectarian, and their use likewise benefits the pupils primarily. If it is constitutional to provide free non-sectarian text books to parochial school children, why is it not equally constitutional to provide these other services? Further, why is it not equally constitutional to pay the salaries of lay instructors teaching non-religious subjects in parochial schools or indeed, even the proportionate part of the salary of teaching nuns, who, after all, devote most of their time to teaching arithmetic, reading, and spelling, and only a small part of the school day teaching Catechism ?

"Actually, the logical application of the Cochran decision and the child-benefit theory would completely frustrate the state constitutional prohibition against the allocation of public school funds to schools not under public control. For, as one court said,[104] "practically every proper expenditure for school purposes aids the child." Indeed, if a proposed expenditure does not benefit the child it is not proper for the public school to make it at all."[105]

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102. Pfeffer, Leo, *Church, State, and Freedom* (1953, Beacon Press, Boston), p.469.

103. *Emmett Cochran v. Louisiana State Board of Education*, 281 US 370 (1930).

104. *Mike Gurney v. J.R. Ferguson*, 190 Okla 254, annot. 168 ALR 1434, 1436 (1941), cert. denied 317 US 588 (1942), (a school bus case).

105. Pfeffer, *op. cit.*, at 469.

Transportation Facilities.

The child benefit theory was more readily acceptable to both American state and Federal courts in the matter of free transportation of parochial school children.[106] The leading case on the point is Arch R. Everson v. Board of Education of the Township of Ewing.[107] In this case the New Jersey statute authorised the local boards of education to provide free transport to children to and and from their schools, if they were living at remote places from their schools. The transport was to be provided to all

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106. Arch R. Everson v. Board of Education of the Township of Ewing, 330 US 1 (1947), William E. Nichols v. Susan B. Henry, 301 ky 434, 191 SW 2d 930, 168 ALR 1385 (1945) and Board of Education v. Wheat, 174 Md 314, 199 A 628, annot. 168 ALR 1434, 1437 (1938). There are, however, a number of state Courts who rejected the child-benefit theory and declared free transportation to parochial school children unconstitutional. See for example, Mitchell v. Consolidated School Dist., 17 Wash 2d 61, 135 P 2d 79, 146 ALR 612 (1943), State ex rel. Traub v. Brown, 36 Del 181, 172 A 835, annot. 168 ALR 1434, 1435 (1934), Glenn L. Judd v. Board of Education of Union Free School District, 278 NY 200, 15 NE 2d 576, 118 ALR 789 (1938), Mike Gurney v. J.H. Ferguson, 190 Okla 254, 122 P 2d 1102, (1941), cert. denied, 317 US 588 (1942) and rehearing denied, 317 US 707 (1942), annot. 168 ALR 1434, 1436.

107. 330 US 1 (1947)

children except those who were attending schools which were run for profit.[108] Acting under this statute, the school board of Ewing Township passed a resolution providing for the transportation of children from Ewing Township to the public and Catholic schools at Trenton.[109] The Township did not provide its own buses for transport, but allowed re-imbursement of cost of public conveyance to the parents of children attending certain public and Catholic schools at Trenton. Arch R. Everson, the appellant, in his capacity as a district

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108. "Whenever in any district there are children living remote from any schoolhouse, the board of education of the district may make rules and contracts for the transportation of such children to and from school, including the transportation of school children to and from school other than a public school, except such school as is operated for profit in whole or in part."
New Jersey Laws, 1941, c.191 p.581; NJ Rev Stat 18: 14-8. Quoted in Arch R. Everson v. Board of Education of the Township of Ewing, Id., at 3, fn. 1.

109. The resolution was as follows :
"The transportation committee recommended the transportation of pupils of Ewing to the Trenton and Pennington High Schools and Catholic Schools by way of public carrier as in recent years. On Motion of Mr. Ralph Ryan and Mr. M. French the same was adopted." (Emphasis added by Rutledge, J., in his dissent in Arch R. Everson v. Board of Education of the Township of Ewing, 330 US 1, 62, fn. 59.

tax payer, challenged the payment on the ground that it was a help to a denominational institution and accordingly void under the establishment clause.

There are several points which need to be considered in connection with this case. In a number of cases both in India and the United States it has been held that a tax payer cannot challenge state expenses on grounds of unconstitutionality unless he could prove either an injury to himself, which must be different from the injury sustained by other tax payers.[110] It was on this ground that in *Elliott v. White*,[111] a federal Court had rejected a tax-payer's suit challenging the employment of Congressional and army chaplains. It is surprising that the important question of personal injury to the appellant as something different from a common injury suffered by all tax payers was ignored

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110. "The party who invokes the power must be able to show not only that the statute is invalid, but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally." *Commonwealth of Massachusetts v. Andrew W. Mellon*, 262 US 447 at 488 (1925) the case was followed in *Alabama Power Company v. Harold L. Ickes*, 302 US 464, 478-9 (1937); *Donald R. Doremus v. Board of Education of the Borough of Hawthorne*, 342 US 429 (1952) and *City of Allegan v. Consumers Power Co.*, 71 F 2d 477, cert. denied, 293 US 586 (1934).

111. 23 F 2d 997 (1928).

by the Court. Following the previous case relating to the supply of text-book, namely Emmett Cochran v. Louisiana State Board of Education,[112] it did not enter into the question of the standing of an individual tax payer. But it thought that a measurable appropriation of public funds had taken place and so it could take up the case.[113]

The main argument in favour of aid before the Court was based on the public welfare theory.[114] Black, J.,

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112. 281 US 370 (1930). So also in Joseph Bradfield v. Ellis H.Roberts 175 US 291 (1899), the Court had intered into the merit of a tax payer's suit.

113. In 1952, the Supreme Court in Donald R. Doremus v. Board of Education of the Borough of Hawthorne, 342 US 429 (1952), rejecting a tax payer's case, laid down the rule that the courts would interfere in a tax payer's case if measurable appropriation or disbursement of public funds is proved or else the tax payer should prove some special injury.

114. The arguments of William H. Spear, who argued the case for appellees that the aid is constitutional on the authority of Cochran (text books at public expense) and Borden (Silas P.Borden v. Louisiana State Board of Education, 67 ALR 1183, (1929 La.) cases; of George F.Barrett Attorney General of Illinois, that the aid is necessary under the free-exercise clause; of Clarence A.Barnes, Attorney General of Massachusetts, that the aid was a protection of the Children's health from exposure to the elements as well as from the hazards of traffic; of James H.Vaughan, that the purpose behind the transportation is a public purpose and as non profit private schools including denominational schools fulfil a public function, any aid given to them on a non-discriminatory basis would be valid. Arch R. Everson v. Board of Education of the Township of Ewing, 330 US 1, pp. 1-3 (1947).

delivering the majority judgment, said that as a rule a legislative judgment that a public purpose would be served by its legislation would be accepted by the Court.[115-116] He was of the view that courts should be very cautious when judging the public purpose which the legislature had in view. Commenting upon the public purpose in the instant case Black, J., pointed out :

> "Moreover, state-paid policemen, detailed to protect children going to and from church schools from the very real hazards of traffic, would serve much the same purpose and accomplish much the same result as state provisions intended to guarantee free transportation of a kind which the state deems to be best for the school children's welfare... Similarly, parents might be reluctant to permit their children to attend schools which the state had cut off from such general government services as ordinary police and fire protection, connections for sewage disposal, public highways and sidewalks."[117]

Accordingly, the provisions for free transportation was for the welfare of the children regardless of their

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115. Id., at 6.

116. In India also the declaration by the legislature that a purpose is a public one is rarely questioned, see Smt. Somawati v. The State of Punjab, AIR 1963 SC 151, 163.

117. Arch R. Everson v. Board of Education of the Township of Ewing, 330 US 1, 17-8.

religion.[118] He admitted that a state statute

> "cannot consistently with the "establishment of religion" clause of the First Amendment contribute tax-raised funds to the support of an institution which teaches the tenets and faith of any church."[119]

But he said a law

> "cannot hamper its citizens in the free exercise of their own religion. Consequently, it cannot exclude individual Catholics, Lutherans, Mohammadans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, _because of their faith, or lack of it_, from receiving the benefits of public welfare legislation."[120]

According to him a court could not prohibit the state from extending its general benefits to all its citizens without regard to their religious belief. He said :

> "Measured by these standards, we cannot say that the First Amendment prohibits New Jersey from spending tax-raised funds to pay the bus fares of parochial school pupils as a part of a general programme under which it pays the fares of pupils attending public and other schools."[121]

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118. _Id._, at 18.

119. _Id._, at 16.

120. _Ibid._ Emphasis added by Black, J., himself.

121. _Id._, at 17.

Jackson[122] and Rutledge, JJ., gave their dissenting opinions separately.[123] According to Jackson, J., while the undertones of the opinion of the majority advocated "complete and uncompromising separation of Church and State," its conclusion gave "support to their commingling in educational matters."[124] According to him both the New Jersey statute as well as the resolution of the school board of Ewing Township were invalid. As to the former he said that the Act distinguished the school going children for getting bus transport help according to the character of the school and not according to the needs of the children. He noted that reimbursement was allowed to children attending public and parochial schools but was not given to children who attended "private schools operated in whole or in part for profit."[125] The reason for

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122. Jackson, J. along with Burton, J., also agreed with the dissenting opinion of Rutledge, J.

123. Frankfurter, J., concurred with the dissenting opinions noted by both Jackson and Rutledge, JJ.

124. He said :
"(T)he undertones of the opinion, advocating complete and uncompromising separation of church from State, seem utterly discordant with its conclusion yielding support to their commingling in educational matters. The case which irresistibly comes to mind as the most fitting precedent is that of Julia who, according to Byron's reports, "whispering 'I will ne'er consent,' - consented."
Arch R. Everson v. Board of Education of the Township of Ewing, 330 US 1, 19 (1947).

125. Id., at 20.

sending children to private schools run for profit might be that "parents feel that they require more individual instruction than public schools can provide, or because they are backward or defective and need special attention."[126] If the benefit was meant for all children it should be given without distinction whether they attended profit making schools or other schools. The resolution in effect classified children for getting state help according to the character of the schools they attended. It was clear that help was given if they attended public schools or private Catholic schools, but such help was not given if they attended private secular schools or private religious schools of other faiths. He noted that the instant case was not brought by the followers of other religions who were not indemnified, but by a tax payer who had complained that he was being taxed for an unconstitutional purpose. He questioned :

> "Is it constitutional to tax this complainant to pay the cost of carrying pupils to Church schools of one specified denomination?"[127]

Referring to the religious character of teaching in Catholic schools, he concluded that the resolution which helped

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126. Ibid.

127. Id., at 21.

only Catholic schools violated the First Amendment. To the reasoning of the majority that the service of the policeman and fire protection given to children were not unconstitutional, he replied :

> "A policeman protects a Catholic, of course - but not because he is a Catholic, it is because he is a man and a member of our society. The fireman protects the Church school - but not because it is a Church school; it is because it is property, part of the assets of our society. Neither the fireman nor the policeman has to ask before he renders aid. "Is this man or building identified with the Catholic Church?" But before these school authorities draw a check to reimburse for a student's fare they must ask just that question, and if the school is a Catholic one they may render aid because it is such, while if it is of any other faith or is run for profit, the help must be withheld." 128

Rutledge, J., in his dissent, supported the opinion of Jackson, J., and held that both the New Jersey statute as also the school board resolution were obnoxious. He traced the history behind the establishment clause[129] and

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128. *Id.*, at 25.

129. He quoted the following extracts from "A Bill for Establishing Religious Freedom," enacted by the General Assembly of Virginia, January 19, 1786:

> "Well aware that Almighty God hath created the mind free; ... that to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical;... We, the General Assembly, do enact, That no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever, nor shall be enforced, restrained, molested, or burthened in his body or goods, nor shall otherwise suffer, on account of his religious opinions or belief."

Id., at 28.

remarked that though a wall of separation was erected originally when the Constitution was adopted the decision in the text-book case, Emmett Cochran v. Louisiana State Board of Education[130] made the first breach in the wall and the instant case would be a second breach. He felt that if this process continued further breaches might take place.

The conclusions reached by the majority are open to several objections. Though the general observation of Black, J., who delivered the majority judgment, was correct, but when he applied them to the instant case it is submitted that he failed to appreciate the facts of the case. It was an admitted fact that the resolution which was passed, as a sequel to the New Jersey statute, authorised reimbursement of transportation charges to certain public schools and Catholic schools only. It did not provide any help to non-Catholic or other private schools. So far as the statute was concerned, which had authorised the local boards of education to pay for the transportation of school

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130. 281 US 70 (1930).

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130. 281 US 70 (1930).

going children, there seems to be no valid objection to it. The Constitution is silent as to the duty of the state to provide for education.[131] As pointed out by Black, J., greater help was to be given to schools which were run on non profit basis. Even Jackson and Rutledge JJ., who gave the dissenting opinions, could not appreciate this difference. For them the statute was also unconstitutional since it made the character of the school, and not the needs of the children, as a test for determining the eligibility of parents to reimbursement. The classification between profit making and non-profit making schools is, it is submitted, on the face reasonable one. After all, only rich persons can afford to send their children to profit making schools, as they do not want their children to be mixed up with ordinary children attending non-profit making schools or other charitable institutions. Those who are prepared to spend and bear the heavy responsibility of payment of fees to profit making schools, do not need any help. The fact that the statute itself provides the transportation to children

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131. It is remarkable that in India state responsibility in this connection has been specifically provided. See articles 41 to 46 of the Constitution.

living remote from school premises supports the above reasoning. In case the transportation facility was not given, there was a possibility that some of the children might not be able to go to church schools and be compelled to attend public schools under the compulsory education system. Under the Pierce case[132] a child has a constitutional guarantee to attend a school of his choice.

The resolution of the Board which discriminated between Catholic schools and other schools was no doubt unconstitutional. The majority judgment delivered by Black, J., is not warranted by the facts of the case. It is admitted that the state could make provision for all school going children under its general welfare programme. The scheme should have been applied universally and without discrimination. The text-book case[133] does not apply to the instant case. In that case the text books were provided by the state free of cost to all children without discrimination whether they attended the Catholic schools

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132. Walter M. Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary, 268 US 510 (1925).

133. Emmett Cochran v. Louisiana State Board of Education, 281 US 370 (1930).

or non-Catholic schools. But here the transportation facility was provided to students attending Catholic or public schools, but not to those who attended non-Catholic schools.

Rutledge, J., while giving the dissenting opinion of the minority, also failed to appreciate the difference between the New Jersey statute and the Board's resolution. When he says that the money taken by taxation from one should not be used or given to support another's religious training or belief, or indeed one's own,[134] he misses the point that the statute by itself provided for the payment of transportation charges for all the children without discrimination, whether attending public schools or private ones, or whether attending schools run by one denomination or another. The only exception made was that the children going to profit making schools were not to be benefited. The legislation was clearly intended to help the children living in remote places. The Board's resolution was, however, offensive because it gave preference to Catholics over others. It seems that Rutledge, J., mixed up the resolution with the statute and declared both

134. Arch R. Everson v. Board of Education of the Township of Ewing, 330 US 1, 44 (1947).

of them unconstitutional. He posed the question : how can an aid become valid if it was given on a more extended scale of daily instruction to children attending parochial schools if "An appropriation from the public treasury to pay the cost of transportation to Sunday School, to weekday special classes at the church or parish house,"[135] was not constitutional. It seems, that he overlooked the fact that the aid under the statute was not given only to the children of the parochial schools but to all children without any distinction whether they attended a parochial, a public or a private school. The long history of the First Amendment, the work done by Madison and Jefferson in this respect, were irrelevant so far as the New Jersey statute was concerned. There are numerous fields in which the Constitution,[136] as interpreted by the courts, have recognised the state's concern with religion to the extent of even recognising some very important religious practices.[137] If these are not constitutionally invalid despite

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135. *Id.*, at 47.

136. A daring example of the Constitution recognising Sunday as a day of rest accepted for certain acts of the President, a notion acceptable only to the people believing a particular religion-Christianity. See article 1, section 7(2), U.S. Constitution, *supra* p.12,fn. 36.

137. Sabbath observances, holiday on Sundays, Saturdays or even on other days of the week for rest are clear recognition of religious practices by the courts.

their infringement of the establishment clause, how would a general provision for help to all school children, living in remote corners be an infringement of the establishment clause merely because some of these children attend parochial schools? Like the police, fire, sewage, road and other facilities, the provision of transportation also should be deemed constitutional. If, however, these services are provided to Catholic schools only and not to others they would be discriminatory. It is therefore submitted that though the resolution of the Board was unconstitutional, the statute was not.

Chapter IV

CONCLUSIONS

The activities of a welfare state should be so channeled as not to hinder the individual in the development of all his faculties. The state should create an atmosphere in which the individual could have freedom of thought and conscience. A secular state may not give financial assistance to religious institutions but it should not unduly hamper the growth of religious institutions by imposing tax and other burdens on them. In both the countries the legislature is empowered to tax or grant tax concessions to religious institutions, nevertheless in practice there are differences in both the countries in this sphere.

It may be noted that on the question of taxation upon religion and religious activities the Constitutions of both India and the United States are silent. Formerly, in America religious activities were equated with other activities for purposes of taxation. For example, if religious institutions engaged themselves in the sale of religious books, they were taxed like any other ordinary book-seller. But such taxation was held by the American Supreme Court in _Robert Murdock v. Commonwealth of Pennsylvania_[1] as an unreasonable restriction on the free exercise

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1. 319 US 105 (1943), _supra_ p. 40.

clause of the First Amendment. Such a tax could not be deemed to be merely a tax on commercial activities but a tax on the freedom of religious propagation. The fact that the religious activities were not subject to taxation did not make any difference. In India the problem of imposing taxes on religious activities arose in a different way. Here the legislature set up managing boards to look after the proper management and administration of religious institutions. On the one hand, the state grants these boards funds out of its own resources and, on the other hand, it levies charges on religious institutions for defraying the expenses of such boards. It has been held that such charges do not infringe the religious liberty whether they amount to a tax or a fee.[2] So also due to the absence of the establishment clause in the Indian Constitution, state grants are also not unconstitutional as they would be in the United States.

It is clear that exemption from taxation extended to religious institutions is a form of assistance to religion. In India the state is free to tax or grant exemption provided such taxation or exemption is non-discriminatory. In the United States concessions given to reli-

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2. Commissioner Hindu Religious Endowments, Madras v. Sri Lakshmindra Tirtha Swamiar of Sri Shirur Mutt, AIR 1954 SC 282, Ratilal Panachand Gandhi v. State of Bombay, AIR 1954 SC 388.

gious institutions have recently been challenged on the plea that they amount to an assistance to religion prohibited by the establishment clause. Tax exemption is considered as an exemptory aid to religious institutions whether such aid takes the form of a direct aid, for example tax exemptions of church buildings, or indirect aid, e.g., assistance to church operated institutions like, hospitals and orphanages and so on. Though the courts have not found so far any invalidity in such exemptory aids, it may be noted that in the face of the establishment clause the direct exemptory aid appears to be violative of the First Amendment. According to one view if the government exempts charitable institutions run by religious bodies, it merely discharges its own function of a welfare state of providing such services to the people at large. In fact the exemption constitutes a very negligible part of state aid to those institutions. It may, however, be argued that the money saved by the religious institutions from tax exemptions is spent on religious purposes and as such amounts to an indirect aid to religion by the state.

When we turn to affirmative financing of religious institutions as distinct from exemptory aid we come to different conclusions according to the circumstances of

each case. In India so far as the financial assistance for purely religious purposes is concerned the Constitution itself provides huge sums of amount for such purposes[3] and authorises the state to give financial aid to religious institutions on a non-discriminatory basis.[4] This is as noted above not permissible in America owing to the establishment clause. But in the case of charitable institutions run by religious denominations, for example hospitals and orphanages, in both the countries the state gives financial assistance to religious bodies to enable them to run the institutions. There is nothing improper in such type of assistance given by the state. But the same may not hold good in the case of denominational educational institutions. In America any direct help to such institutions would be unconstitutional. In India, the state under the terms of article 30(2) has to give assistance to all denominational schools whenever it gives aid to other educational institutions. It cannot exclude an educational institution on the ground that it is tun by a religious denomination. Both in India and America so far as indirect aid to parochial school is

3. Article 290-A.

4. See e.g., articles 27 and 30(2).

concerned the position is identical. In the United States in matters of giving book aid and providing transportation facilities it has been settled that an aid on a non-discriminatory basis can be given to such institutions. It is presumed that in a welfare state the government should take interest in the educational development of children whether they attend a parochial or a public school. The help which the state gives is meant for the benefit of the child and not for the denomination which runs the school. Even if such assistance helps a religion the state should not debar itself from helping such educational institutions because of supposed constitutional niceties.

PART-TWO

FREE EXERCISE OF RELIGION.

Chapter V

Concept of Religion

The judges and jurists have made attempts to define religion but no definition has been found which would be adequate and acceptable to all.[1] As far back as 1890, Field, J., of the United States Supreme Court said :

> "The term "religion" has reference to one's views of his relations to his Creator, and to the obligations they impose of reverence for his being and character, and of obedience to his will."[2]

Similarly, in _United States v. Douglas Clyde Macintosh_,[3] Hughes, C.J., defined religion as a belief in relation to God:

> "The essence of religion is belief in a relation to God involving duties superior to those arising from any human relation."[4]

These definitions presuppose the existence of a Creator or some entity superior to human beings whether

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1. In _Adelaide Company of Jehovah's Witnesses v. The Commonwealth_, 67 CLR 116 (1943), Latham, C.J., admitted the difficulty of defining the term religion and observed, (at p.123):
   "It would be difficult, if not impossible, to devise a definition of religion which would satisfy the adherents of all the many and various religions which exist, or have existed, in the world. ... What is religion to one is superstition to another."

2. _Samuel D.Davis v. H.G. Beason_, 133 US 333, 342 (1890).

3. 283 US 605 (1931).

4. _Ibid_, at 633-4.

the entity is labeled as a God, a Supreme Being or a Creator. This definition, therefore, could be accepted by those persons who believe in a God or in a Supreme Being, but others who do not believe in the existence of a Creator would find it difficult to accept it. For example, according to Buddhism, the man is a part of the universe. Every thing in the universe takes different shapes at different times. All human activity is a temporary manifestation of a part of this universe.[5] This shows that a Buddhist does not believe in a God who is conceived as Supreme Being and Creator of the Universe. While, according to Field, J., religion has

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5. Nancy Wilson Ross states the concept of Buddhism as follows :

> "(T)he universe, and man are one indissoluble existence, one total whole. Only THIS - capital THIS is. Anything and everything that appears to us as an individual entity or phenomenon, whether it be a planet or an atom, a mouse or a man, is but a temporary manifestation of THIS in form; every activity that takes place, whether it be birth or death, loving or eating breakfast, is but a temporary manifestation of THIS in activity. When we look at things this way, naturally we cannot believe that each individual person has been endowed with a special and individual soul or self. Each one of us is but a cell, as it were, in the body of the Great Self, a cell that comes into being, performs its functions, and passes away, transformed into another manifestation."

Ross, N.W., _The World of Zen_, (1960), p.18. Quoted by Douglas, J., in _United States v. Daniel Andrew Seeger_, 380 US 163, 190 (1965).

reference to one's views of his relations to the Creator, according to Buddhists, God is not something different from the individual but there is oneness, and the individual is a part of the Universe and all his activities are but a temporary manifestation of the one Reality.

In Samuel D. Davis v. H.G. Beason[6] the Mormons, a particular sect in America, claimed that polygamy was a part of their religion, as they asserted that their views about polygamy had a concern with their relation to the Creator and to the obligations it imposes. Field, J., though he admitted that the Mormons' church believed in the practice of polygamy, observed that the religious freedom guaranteed by the Constitution was not above the criminal laws of the country. A polygamous marriage being criminal in its nature, no one could be allowed to practise it in the name of religion. If one were allowed, Field, J., noted,

> "those who do not make polygamy a part of their religious belief may be found guilty and punished, while those who do must be acquitted and go free."[7]

In the United States the courts usually give a wide

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6. 133 US 333 (1890).

7. Id., at 344.

meaning to religion,[8] provided that its practice does not involve the commission of any criminal act. Normally, they do not investigate the religious practices and beliefs in order to determine whether a particular practice or belief could be described as pertaining to religion. Thus in Jesse Cantwell v. State of Connecticut,[9] where a statute authorised the state to grant licences for the propagation and solicitation of religion, the Court declared the law unconstitutional holding that it deprives a person of his liberty without due process of law. Roberts, J., delivering the judgment reasoned :

> "to condition the solicitation of aid for the perpetuation of religious views or systems upon a license, the grant of which rests in the exercise of a determination by state authority as to what is a religious cause, is to lay a forbidden burden upon the exercise of liberty protected by the Constitution."[10]

In a later case,[11] the Supreme Court rejected the view that the jury should decide the question of fact about the claimant's religious belief. Douglas, J., delivering the judgment, noted that it is practically impossible to prove the particular religious belief which a person holds. In

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8. See: United States v. Daniel Andrew Seeger, 380 US 163 (1965) and Washington Ethical Society v. District of Columbia, 249 F 2d 127 (1957).

9. 310 US 296 (1940)

10. Id., at 307.

11. United States of America v. Edna W. Ballard, 322 US 78 (1944).

United States of America v. Edna W. Ballard[12] the respondents were convicted for the offence of defrauding federal mails. They were charged for a scheme to defraud by organising and promoting the "I AM" movement through the use of the mails. The facts were that certain corporations were formed, literature distributed and sold, funds solicited and memberships in the "I Am" movement sought by means of false and fraudulent representations, pretenses and promises. The sponsors of the movement claimed that, by reason of supernatural attainments, they had the power to heal persons of ailments, diseases and injuries and they had the ability and power to cure persons of those diseases which were normally classified as incurable by the medical profession.[13] Though the Court of Appeals had held that the jury should have the right to determine as to the truth of representations concerning the respondents' religious beliefs,[14] the United States Supreme Court by a 5 to 4 decision rejected this view and observed that the jury

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12. 322 US 78 (1944).

13. The Faith healing is very common in Protestant churches. It is based on the New Testament, according to which both Jesus and his disciples practised it. Time, (Asia edition), June 14, 1963, 41. For a detailed note and network of faith healing, see the Article, Faith Healers, Time, (Asia edition), March 7, 1960, 35.

14. Edna W. Ballard v. United States of America, 138 F 2d 540.

could not speculate on the truth of the respondent's religious beliefs. Douglas, J., delivering the majority judgment, said :

> "Men may believe what they cannot prove. They may not be put to proof of their religious doctrines or beliefs.... The miracles of the New Testament, the Divinity of Christ, life after death, the power of prayer are deep in the religious convictions of many. If one could be sent to jail because a jury in a hostile environment found those teachings false, little indeed would be left of religious freedom."[15-16]

The definition of religion was given a new turn in the recent United States Supreme Court case of United States v. Danial Andrew Seeger.[17] The Universal Military Training and Service Act 1948 provided exemption for a conscientious objector from military service if he objected to participation in war by reason of his 'religious

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15. United States of America v. Edna W. Ballard, 322 US 78, 86-7 (1944).

16. In India, a recent legislation, the Drugs and Magic Remedies (Objectionable Advertisement) Act, 1954 (Act 21 of 1954) prohibited all advertisements to cure certain diseases by magic remedies (section 5). The 'magic remedy' prohibited under this act includes "a talisman, mantra, kavach, and any other charm of any kind which is alleged to possess miraculous powers" for the treatment of any disease (section 2 (c)). Though the mantra healing may be claimed as a religious practice, the state has right to legislate on this matter in order to save the health of the public. It is a reasonable restriction in the interest of the general public. See Hamdard Dawakhana v. The Union of India, AIR 1960 SC 554. Certain sections of the Act (sections 3(d) and 8) were, however, held ultravires on certain technical grounds. See Hamdard Dawakhana v. The Union of India, op. cit.

17. 380 US 163 (1965).

training and belief'. In Samuel D. Davis v. H.G.Beason[18] Field, J., had observed that religion is connected with one's views as to his relations with the Creator. In Seegar's case,[19] the Act itself defined the term 'religious training and belief' as an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation. Seeger, one of the conscientious objectors, stated that his religion was a "belief in and devotion to goodness and virtue for their own sakes"[20] and not due to a belief in a Supreme Being. He cited Plato, Aristotle and Spinosa to prove that his was an ethical belief in intellectual and moral integrity without belief in God except in the remotest sense. Another objector, Jakobson, asserted that he believed in "Godness" which was "the Ultimate Cause for the fact of the Being of the Universe" and that religion was the "sum and essence of one's basic attitude to the fundamental problems of human existence."[21] He said that the relationship to Godness was in two directions, i.e., "vertically, towards Godness directly," and "horizontally, towards Godness through Mankind and the World."[22] Peter, the third objector,

18. 133 US 333 (1890), supra n.2.
19. United States v. Daniel Andrew Seegar, 380 US 163(1965).
20. Id., at 166.
21. Id., at 168.
22. Ibid.

who claimed exemption from military service, pleaded that "he felt it a violation of his moral code to take human life and that he considered this belief superior to his obligation to the state."[23-24]

Clark, J., who delivered the opinion of the Court, cited several definitions of religion given by different theologicians and philosophers and observed that though all of them held diverse views as to the precise meaning of religion, there was one thing common to them all that in their lives their views were paramount. He admitted that though it was difficult to give a definition of religion acceptable to all, "the claim of the registrant that his belief is an essential part of a religious faith must be given great weight."[25] He held that all the three claimants were entitled to the exemption as they were sincere in their belief based as it was on their own moral experience and faith.

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23. *Id.*, at 169. He quoted with approval the following definition of religion given by Reverend John Haynes Homes:

    "(T)he consciousness of some power manifest in nature which helps man in the ordering of his life in harmony with its demands .... (it) is the supreme expression of human nature; it is man thinking his highest, feeling his deepest and living his best."

    Ibid.

24. Speaking, recently, at an international symposium on "The Culture of Unbelief," sociologist Thomas Luckman of Frankfurt University predicted that eventually the categories of "belief" and "unbelief" would disappear, the distinctions between believers and nonbelievers

In a concurring opinion Douglas, J., adverting to the concept of Hinduism and Buddhism, reasoned that as there are a large number of Buddhists living in different parts of the United States and as they do not believe in "God" or the "Supreme Being" in the sense in which other Americans believe, it is necessary that a wide interpretation should be given to what amounts to religious belief. The learned judge accordingly came to the conclusion that,

> "any person opposed to war on the basis of a sincere belief, which in his life fills the same place as a belief in God fills in the life of an orthodox religionist, is entitled to exemption under the statute."[26]

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would fade, and religion would emerge in a new form. It would be an institutional specialisation. In such a case an individual may evolve his own private set of ultimate values. The role of a church, at that time, would be not to command belief but to help each person articulate his beliefs from within himself. See Time, (Asia edition), April 4, 1969, 30-1.

25. United States v. Daniel Andrew Seagar, 380 US 163, 184 (1965).

26. Id., at 192-3.

In India, the vexed problem of defining 'religion' arose in 1954 in two cases before the Supreme Court.[27] In both the cases Mukherjea, J., who delivered the judgment of the Court, gave a very wide definition of the term 'religion'. In one case, Commissioner Hindu Religious Endowments, Madras v. Sri Lakshmindra Tirtha Swamiar of Sri Shirur Mutt,[28] he pointed out that though a religion has its basis in a system of beliefs or doctrines which are regarded by those who profess that religion as conducive to their spiritual well being, it would not be correct to say that religion is nothing else but a doctrine or belief. Admitting that the word "religion" is a term which is hardly susceptible of any rigid definition, he elaborated :

> "A religion may not only lay down a code of ethical rules for its followers to accept, it might prescribe rituals and observances, ceremonies and modes of worship which are regarded as integral parts of religion, and these forms and observances might extend even to matters of food and dress."[29]

His observations made in the other case[30] are also relevant.

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27. Commissioner Hindu Religious Endowments, Madras v. Sri Lakshmindra Tirtha Swamiar of Sri Shirur Mutt, AIR 1954 SC 282 and Ratilal Panachand Gandhi v. State of Bombay, AIR 1954 SC 388.

28. AIR 1954 SC 282.

29. Id., at 290.

30. I.e., Ratilal Panachand Gandhi v. State of Bombay, AIR 1954 SC 388.

There he says :

> "Religious practices or performances of acts in pursuance of religious belief are as much a part of religion as faith or belief in particular doctrine."[31]

These two cases make it plain that religion includes faith, belief, religious practices, performance of acts in pursuance of religious belief, doctrines regarded as conducive to spiritual well being, a code of ethical rules, rituals, observances, ceremonies and modes of worship.

In the subsequent case of _Mohammad Hanif Quareshi v. State of Bihar_,[32] the question arose as to what amounts to matters of religion. In that case various state laws[33] prohibiting the slaughter of certain animals including cows were challenged on the ground that such laws infringed the appellant's religious right to sacrifice a cow. The appellant claimed that it was a practice and custom sanctioned by Muslim law to slaughter cows. It was further claimed that such sacrifice was enjoined upon every Muslim on the Bakr-Id day.[34] Rejecting this claim the

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31. _Ratilal Panachand Gandhi v. State of Bombay_, AIR 1954 SC 388, 392.

32. AIR 1958 SC 731.

33. The Bihar Preservation and Improvement of Animals Act 1956 (Bihar Act 2 of 1956), the U.P. Prevention of Cow Slaughter Act, 1955 (U.P. Act 1 of 1956) and the M.P. Acts 23 of 1951 and 10 of 1956, amending the C.P. and Berar Animal Preservation Act (52 of 1949).

34. See _infra_ p. 231, fn.15.

Court held that any practice based on religion must be an essential and obligatory injunction of that religion. As there was an option to sacrifice a camel,[35] the practice could not be regarded as something essential and obligatory. The Court traced the history of cow-slaughter in India and noted that in the past, a number of Muslim kings had prohibited slaughter of cows even on the occasion of Bakr-Id day. This consideration led the Court to hold that the sacrifice of a cow on a particular day was not obligatory upon a Muslim with a view to give expression to his religious belief.

It is worth noting that in the Shirur Math's case,[36] Mukherjea, J., had said,

> "What constitutes the essential part of a religion is primarily to be ascertained with reference to the doctrines of that religion itself.
>
> "Under Art. 26(b), therefore, a religious denomination or organisation enjoys complete autonomy in the matter of deciding as to what rites and ceremonies are essential according to the tenets of the religion they hold and no outside authority has any jurisdiction to interfere with their decision in such matters."[37]

However, in the Quareshi case[38] the Court laid down a

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35. The cow sacrifice was enjoined in alternative to a certain number of goats or a camel. See ibid.

36. Commissioner Hindu Religious Endowments, Madras v. Sri Lakshmindra Tirtha Swamiar of Sri Shirur Mutt, AIR 1954 SC 282.

37. Id., at 290-1. Emphasis added.

38. Mohammad Hanif Quareshi v. State of Bihar, AIR 1958 SC 731.

stringent test namely, that the practice should be an essential part of religion. In the United States, it may well be that in similar circumstances, the courts might have accepted the contention of the petitioner without requiring any stringent proof of his faith on account of wide meaning given to religion.[39-40]

The cases cited above show that the term 'religion' is not capable of being defined in a clearcut and precise manner. As a general rule, the approach of the courts in both the countries has been a liberal one. They have in many cases accepted various practices as coming within the ambit of religion. The courts in India, however, unlike the courts in the United States, have taken upon themselves the task of ascertaining whether religious practices constitute both an essential and an integral part of a particular religion. In the United States, the courts do not usually go into such

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39. Cf. Harry E.Groves, Religious Freedom, 4 JILI 191, 199 (1962):

    "The American judicial practice of refusing to explore matters of religious doctrine, except in the area the courts consider inescapable under conflicting private claims, that of specific trusts, would preclude a finding such as that in M.H. Quareshi v. State of Bihar."

40. See also the remarks of Douglas, J., in United States of America v. Edna W.Ballard, 322 US 78 (1944), referred to above, p.135.

questions. If they think that a particular practice is improper, they do not investigate whether or not it is "essential and integral" part of religion but simply hold such practice invalid as being offensive, immoral or opposed to public policy.

Chapter VI

Freedom of Conscience or Choice of Religion.

The religious freedom guaranteed by article 25 of our Constitution has various aspects which shade into each other. These aspects are (i) freedom of conscience or choice of religion, (ii) right to profess religion, (iii) right to practise religion, and (iv) right to propagate religion. In this chapter the scope of the freedom of conscience is discussed, and in the subsequent chapters other attributes of religious freedom are dealt with. Taking the United States first, we find that the free exercise of religion is guaranteed by the First Amendment to the Constitution. There the word 'exercise' has been given a wide meaning by the courts and all such rights which are contained in article 25 of our Constitution appear to be included in the expression 'exercise' of the First Amendment.[1] A distinction is, however, made between belief and the practice of religion. The courts in the United States acknowledge that the right to believe in a particular religious tenet cannot be a subject matter

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1. Basu, D.D., Commentary on the Constitution of India (1962, S.C. Sarkar & Sons, Calcutta), II, 144.

of judicial scrutiny. In *Jesse Cantwell v. State of Connecticut*,[2] Roberts, J., said,

> "Freedom of conscience[3] and freedom to adhere to such religious organization or form of worship as the individual may choose, cannot be restricted by law."[4]

But while the freedom of religious belief in the United States is absolute, the right to exercise it is not unrestricted.[5] In other words, the courts disclaim that they are justified in penalising a person for his mere belief.

In India, however, under the terms of article 25, even the right to believe is it appears subject to all the restrictions to which other rights are subject.

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2. 310 US 296 (1940).

3. It may be noted that the same year, Frankfurter, J., expressed in another case that "freedom to follow conscience" was not an absolute freedom. *Minersville School District v. Walter Gobitis*, 310 US 586, 594 (1940). This opinion was, however, overruled in *West Virginia State Board of Education v. Walter Barnette*, 319 US 624 (1943). See *infra* pp.170-2.

4. *Jesse Cantwell v. State of Connecticut*, 310 US 296, 303 (1940).

5. *Samuel D. Davis v. H.G. Beason*, 133 US 333 (1890).

It is significant that the article guaranteeing religious freedom opens with certain restrictions. Subject to these restrictions the religious freedom, including the freedom of conscience, has been guaranteed. Freedom of conscience means that a person is free to entertain any belief or doctrine concerning matters which are regarded by him to be conducive to his spiritual well being.

The question of the sincerety of religious belief has arisen in several fields of which most important being military service exemptions, flag salutes and school prayer. Each one of these is considered below.

(a) Military Service Exemption.

In the United States, a person is usually exempted from military service on the ground of his religious beliefs. Though the United States Constitution does not provide for any exemption on religious grounds, both the Congress and the state legislatures, who are responsible for raising the militia of the country are entitled to grant exemption by law on any ground they think fit.[6]

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6. The Constitution of the state of Illinois, for example, while authorises the state to raise the militia consisting of all able-bodied male persons resident in the state of a certain age-group, exempts "persons having conscientious scruples against bearing arms." Constitution of Illinois, Art.12, s.6, Ill. Rev. Stat. 1945, quoted in re Clyde Wilson Summers, 325 US 561, 572, fn.11 (1945).

The courts are not concerned with policy or wisdom of such legislative exemptions. Their task is confined to interpretation of enactments granting exemptions or concessions.

There are some persons who hold the view that there should be a general rule allowing exemption to conscientious objectors from military service. In an article published as far back as 1919, Harlan Fiske Stone advanced the view that full exemption from military service be accorded to conscientious objectors.[7] He argued that freedom of conscience has a moral and social value and therefore the state should not interfere with the conscience of the individual. In his own words :

> "(B)oth morals and sound policy require that the state should not violate the conscience of the individual. All our history gives confirmation to the view that liberty of conscience has a moral and social value which makes it worthy of preservation at the hands of the state. So deep in its significance and vital, indeed, is it to the integrity of man's moral and spiritual nature that nothing short of the self-preservation of the state should warrant its violation; and it may well be questioned whether the state which preserves its life by a settled policy of violation of the conscience of the individual will not in fact ultimately lose it by the process."[8]

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7. Stone, Harlan Fiske, *The Conscientious Objector*, 21 Col. Univ. Q. 253, 269 (1919).

8. *Ibid.*

In *United States v. Douglas Clyde Macintosh*,[9] Hughes, C.J., in his dissenting opinion, pointed out that the principle, on which an exemption is granted to conscientious objectors, is that there is a "duty to a moral power higher than the state"[10] which must be recognised and respected by the state.

In the United States the claim of a conscientious objector for exemption from military service is well established. During the Civil War, the Federal Militia Act, 1862, authorised the states to exempt persons on religious grounds.[11] The Draft Act, 1864,[12] extended the exemptions to the members of religious denominations, which were opposed as a matter of faith to the bearing of arms, and which enjoined their members from doing so by the articles of faith of their denomination.[13] During the First World War, the Draft Act, 1917[14] granted exemptions to those objectors who were affiliated to a

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9. 283 US 605, (1931).

10. *Id.*, at 633.

11. *United States v. Daniel Andrew Seeger*, 380 US 163, 170 (1965).

12. 13 Stat. 9., *Id.*, at 171.

13. Selective Service System Monograph No.11, Conscientious objection, 40-41(1950). Referred to *Id.*, at 171.

14. 40 Stat. 76, 78., *Ibid.*

"well recognised religious sect or organization (then) organised and existing and whose existing creed or principles (forbade) its members to participate in war in any form..." Subsequently, the Secretary of War further extended the exemption by issuing instructions that "personal scruples against war"[15] be considered as constituting "conscientious objection."[16]

In *Joseph F. Arver v. United States of America*,[17] the Draft Act of 1864 came up for consideration before the United States Supreme Court. The Act had granted exemptions to religious ministers, the students of theology and the members of sects who had conscientious objections to war. It was contended that the exemption in question was a violation of the First Amendment as amounting to a recognition and establishment of religion. The Court rejected the plea and held that the exemption did not violate the First Amendment as it was neither

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15. It was a remarkable departure, because up to that time exemption was allowed only to those who were attached to some recognised religious denomination if their faith forbade military service.

16. Selective Service System Monograph, *op.cit.*, 84-88.

17. 245US 366 (1918).

an establishment of religion nor an interference with the free exercise thereof.[18]

It may be noted that the exemption from military service granted to conscientious objectors applies only to combatant services. There is no exemption in the case of compulsory military trainingin an educational institution. This question was raised in _Albert W. Hamilton v. Regents of the University of California._[19] The University of California expelled a number of students on the ground that they had refused to enroll themselves for compulsory military training. The students, who were young members of the Methodist Episcopal Church and of the Epworth League, asserted that they were bound by their own conscience, and the discipline and tenets of the Methodist Church, which, they claimed, required them to abstain from military training both in peace and war. The students appealed to the United States Supreme Court on the ground that their constitutional right of religious freedom was being unlawfully abridged by their expulsion from the University simply because of their

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18. _Id.,_ at 590.
19. 293 US 245 (1934).

adherence to their religious beliefs. The Court rejected the claim and held that they had no constitutional right to abstain from military training on religious grounds. The Court pointed out that the government is duty bound to maintain a standing army to defend the country and its people. It could require every citizen as a matter of reciprocal obligation to support and defend the state. In the words of the Court :

> "Government, federal and state, each in its own sphere owes a duty to the people within its jurisdiction to preserve itself in adequate strength to maintain peace and order and to assure the just enforcement of law. And every citizen owes a reciprocal duty, according to his capacity, to support and defend government against all enemies."[20]

In 1945, the Supreme Court followed the Hamilton case[21] in re Clyde Wilson Summers.[22] In this case the Supreme Court of Illinois denied admission to the practice of law in that state to a lawyer because he had refused to take an oath that in case of need he would take military service. The claim of the petitioner was

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20. Albert W. Hamilton v. Regents of the University of California, 293 US 245, 262-3, (1934).

21. Albert W. Hamilton v. Regents of the University of California, 293 US 245 (1934).

22. 325 US 561 (1945).

based on the ground of conscientious objection and his belief in the doctrine of non-violence. The state Supreme Court while rejecting the application for admission, held that the petitioner, being a believer in the doctrine of non-violence, would not use force even in order to prevent wrong being done to any person. On appeal the United States Supreme Court was divided on the point. By a 5 to 4 decision, the Court upheld the judgment of the Supreme Court of Illinois and rejected the petitioner's contention that he could object to swear for military service on conscientious grounds. Reed, J., who delivered the majority opinion, was, however, conscious of the fact that a person could not be excluded either from the practice of law or even from any other profession simply because he belonged to any religious group.[23] He noted that while exemptions from military service was specifically provided by the Congress in Selective Training and Service Act, the law of the state of Illinois did not exempt a conscientious objector. Relying on those cases[24] in which the claims of aliens

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23. Id., at 571.

24. United States of America v. Rosika Schwimmer, 279 US 644 (1929), United States v. Douglas Mc Clyde Macintosh, 283 US 605 (1931).

for admission to citizenship was rejected as they had refused to pledge for military service, he held that insistence of the state of Illinois requiring a pledge for military service did not violate the principles of religious freedom which the Fourteenth Amendment secures against state action.[25-26] Black, J., who delivered the dissenting opinion, on his own behalf and on behalf of the three other Judges, was critical of the stand taken by the majority opinion. He was of the view that the state should not debar a well qualified man of good character from a public position merely because of his religious belief. He noted :

> "I cannot agree that a state can lawfully bar from a semi-public position, a well-qualified man of good character solely because he entertains a religious belief which might prompt him at some time in the future to violate a law which has not yet been and may never be enacted."[27]

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25. In re Clyde Wilson Summers, 325 US 561, 573 (1945).

26. Since James Louis Girouard v. United States of America, 328 US 61 (1946), overruled those cases in which aliens were refused admission to citizenship on the ground of religious scruple, it seems that now the view of the majority is not tenable.

27. In re Clyde Wilson Summers, 325 US 561, 578 (1945).

During the Second World War, the Selective Training and Service Act, 1940,[28] broadened the scope of exemption to the claimant's opposition to war based on his "religious training and belief." The persons so exempted were assigned to non-combatant services. This was the first time when the American Congress recognised the right of exemption on grounds of a personal religious belief.[29] In cases arising before the federal Courts of Appeals, prior to 1948, it was held that the term "religious training and belief" did not include philosophical, social or political outlook.[30] In 1948, the Congress clarified the term "religious training and belief", by defining it as,

> "an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but (not including) essentially political, sociological, or philosophical views or a merely personal moral code."[31]

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28. 54 Stat. 889.

29. It might be pointed out that those who did not believe in any religion were not entitled to such exemption on grounds of their freedom of conscience.

30. United States v. Kauten, 133 F 2d 703 (CA 2d Cir, 1943); Herman Berman v. United States, 156 F 2d 377 (CA 9th Cir, 1946), (certiorari denied 329 US 795, 1946).

31. Universal Military Training and Service Act, 1948, S.6 'j', referred to in United States v. Daniel Andrew Seeger, 380 US 163, 172 (1965).

The question of rendering military service arose in a number of cases in which aliens were refused admission to citizenship on the sole ground that they had refused to bear arms. In a series of cases[32] the United States Supreme Court had rejected a claim based on religious objection. But in 1946 in _James Louis Girouard v. United States of America_[33] the earlier cases in which the Court had rejected the claim were overruled. The Court held that the Congress could not be deemed to have intended to disqualify from citizenship those aliens whose religious convictions barred them from combatant service. The oath of allegiance required the alien adopting the citizenship of the United States to support and defend the Constitution and the laws of the United States against all enemies. In the earlier overruled cases it was held that in order to defend the country a citizen might be required to take combatant service and if an alien refused to accept the same, he was not entitled to be admitted to citizenship. But in the

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32. _United States of America v. Rosika Schwimmer_, 279 US 644 (1929), _United States v. Douglas Clyde Macintosh_, 283 US 605 (1931), _United States v. Marie Averil Bland_, 283 US 636 (1931).

33. 328 US 61 (1946).

instant case Douglas, J., delivering the opinion of the majority, held that a mere refusal to bear arms was not necessarily a sign of disloyalty. According to him,

> "those whose religious scruples prevent them from killing are no less patriots than those whose special traits or handicaps result in their assignment to duties far behind the fighting front."[34]

Illustrating the point as to how non-combatants defend the country, he said :

> "The bearing of arms, important as it is, is not the only way in which our institutions may be supported and defended, even in times of great peril. Total war in its modern form dramatizes as never before the great cooperative effort necessary for victory. The nuclear physicists who developed the atomic bomb, the worker at his lathe, the seaman on cargo vessels, construction battalions, nurses, engineers, litter bearers, doctors, chaplains - these too made essential contributions. And many of them made the supreme sacrifice."[35]

He argued that just as the ordinary citizens were entitled to exemption from combatant service under the provisions of law, an alien who was seeking citizenship should also be not required to take an oath that in case of need he would take the arms. While the officials who make and enforce the laws of the country need not take an oath if they were conscientiously opposed to war, why a stricter standard be required from aliens seeking admission to citizenship? The Court by a 5 to 3 majority declared that

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34. *Id.*, at 64-65.

35. *Id.*, at 64.

an alien, whose religious scruples refrained him from combatant service was entitled to be admitted to citizenship if he fulfilled other conditions of admission.

A recent case on the point is United States v. Daniel Andrew Seegar.[36] In this case Seeger and others claimed exemption on religious grounds under the Universal Military Training and Service Act, 1948.[37] The Act itself exempted from military training and service all those persons who, by reason of their religious training and belief, were conscientiously opposed to participation in war in any form. The Supreme Court gave a very liberal interpretation to the term "religious training and belief" and held that the test of belief is the sincerity with which a person holds his belief. Though the Court admitted that the truth of a belief could not be questioned, it said that it could be discovered if a claimant "truly held" the view. The Court, having found that all the claimants before it were sincere in their views, held that they were all entitled to the exemption. Following this case, the Seventh Circuit Court of Appeals[38] held that even if a claimant was unable to demonstrate or

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36. 380 US 163 (1965). For a detailed discussion of the case see pp.135-8 supra.

37. 50 U.S.C. Appx S.456(j).

38. United States v. Stolberg, 346 F 2d 363 (1965).

prove his religious belief, or that the Supreme Being constituted a force outside of man, he was entitled to the status of a conscientious objector, if he was opposed to combatant service or killing of human beings.

In India, article 25 guarantees freedom of conscience subject to the provisions of the third part of the Constitution dealing with fundamental rights. Article 23, as a general rule, prohibits traffic in human beings, begar and other similar forms of forced labour, the contravention of which is punishable under different laws.[39] But, clause (2) of that article permits the state to impose "compulsory service for public purposes", provided it does not discriminate on grounds only of religion, race, caste or class.[40]

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39. E.g. sections 370, 371 and 374, Indian Penal Code, 1860, (Act 45 of 1860). The suppression of Immoral Traffic in Women and Girls Act, 1956 (Act 104 of 1956).

40. "Nothing in this article shall prevent the State from imposing compulsory service for public purposes, and in imposing such service the State shall not make any discrimination on grounds only of religion, race, caste or class or any of them."
Article 23(2), Constitution of India.
Cf. the American Constitution which merely prohibits the involuntary servitude without any reservation for compulsory service for public purposes. Section 1 of the Thirteenth Amendment says :
"Neither slavery nor involuntary servitude, except as punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."
The power of conscription for military service has, however, been found by the American Courts implied in the authority of the Congress to raise army (Article I, 12, U.S. Constitution) and it is "beyond question".
Jacob Lichter v. United States of America, 334 US 742, 756(1948). See also United States v. David Paul O'Brien, 20 L ed 2d 672 (1968), AIR 1969 USSC 7, 13 (1969).

In other words, no one is entitled to exemption from compulsory service on grounds of religious belief.[41] It may be noted that since conscription for military service does not amount either a traffic in human beings or begar and since the words "other similar forms of forced labour" should be construed _ejusdem generic_, conscription for military service does not come within the prohibition of article 23(1). It, therefore, seems that the exception contained in clause (2) of the article should not apply to cases of conscriptions. In any event conscription is a kind of compulsory service for a public purpose. As such the restriction laid down in clause (2) namely, that there is to be no discrimination on grounds of religion, race, caste or any of them is applicable. Though there is no direct case where an exemption from compulsory service on religious grounds was asked for and refused, it follows from the provisions of article 23(2) that no one is entitled to seek exemption from military

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41. Professor Alexandrowicz, says that paradoxically the United States exempts persons on religious grounds though they are not exempted in India. Alexandrowicz, C.H., _The Secular State in India and the United States_, 2 JILI 273, 291, (1000).

service on grounds of religious scruples.[42] As the religious freedom guaranteed in India under article 25 is subject, on the one hand, to public order and safety etc., and on the other hand, to the other provisions of the third part of the Constitution dealing with Fundamental Rights, including article 23, article 25 must give way to article 23.

In the Constituent Assembly,[43] as also in its various committees and sub-committees,[44] the question of compulsory military service was discussed at great length, but it seems that the question of exempting conscientious objectors from such service was not even raised. Though there was a difference of opinion as to whether the conscription clause should be provided

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42. In The State v. Jorawar, AIR 1953 HP 18, it was noted that conscription for the defence of the country, or for the social services, are possible instances of imposition of compulsory service for public purposes under article 23.

43. C.A.D., Vol VII, pp. 803-13.

44. For a discussion of the matter before these committees, see Rao, B.Shiva, The Framing of India's Constitution: A Study (1968 Indian Institute of Public Administration, New Delhi), pp. 249-57, and Austin, Granville, The Indian Constitution: Cornerstone of a Nation (1966 Clarendon Press, Oxford), p. 65.

or not,[45] no one raised the question of providing exemption to a person, who might object to combatant service because of his religious scruples.

The question of compulsory service for public purposes arose recently before the Calcutta High Court in Dulal Samanta v. The District Magistrate, Howrah.[46] Section 17 of the Police Act, 1861[47] authorises a Magistrate in certain circumstances to take the services of any number of persons for the preservation of peace in any locality. Fearing sabotage activities, the

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45. Amrit Kaur and Hansa Mehta in their note of dissent to the conscription clause reasoned :
"(W)e recorded our vote against compulsory service in any form ... We look upon compulsion as against all tenets of democracy and would point to the danger for giving to the State powers of compulsion in any sphere of life."
Rao, op. cit., Select Documents, II p.178.
Alladi Krishnaswami in support of conscription said:
"(W)ar may be forced upon India much against her will and in sheer self-defence she might have to raise an army appropriate to the occasion.... The State exists for all and for any particular class of citizens wedded to any particular creed or persuasion."
Id., at p.180.
B.R. Ambedkar noted :
"Ban on compulsory military service by a nation living in the midst of hostile nations free to impose compulsory military service is nothing but wilful self-immolation which is contrary to wisdom and morally quite heinous."
Id., at p. 193.

46. AIR 1958 Cal 365.

47. Act 5 of 1861.

Magistrate, acting under section 17 of the Police Act asked the petitioner to watch the railway track passing through his village for a certain period. He complained that as the work was unremunerative, it was a kind of forced labour prohibited under article 23(1). He also alleged that it interfered with his ordinary livelihood and avocation of life. In rejecting these contentions the Court reasoned :

> "In a democratic state it is a worthy obligation of a resident of a locality to be called up for service as a special police officer to help in removing the threat or breach of peace of the locality in which he resides. It is a civic obligation of every citizen to discharge the duty to the State which gives him security, protection and opportunity."48

It concluded that in any view of the case the conscription for police service was a kind of compulsory service for public purpose within the meaning of article 23(2) of the Constitution.

On a perusal of the constitutional provisions of the Indian Constitution and the American cases referred to above we find that there is a great difference between the two countries in the matter of exemption from military service on the ground of religion. While the Indian

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48. Dulal Samanta v. The District Magistrate, Howrah, AIR 1958 Cal 365, 372.

Constitution expressly prohibits the state from discriminating on the ground of religion, the United States Constitution is silent on the point. Various enactments made in the United States requiring compulsory military service provide for an exemption to certain conscientious objectors. Such exemptions have been liberally interpreted by the courts and benefits have been given to the claimants on grounds of their religious belief. It is submitted that by virtue of article 23(2), if any law grants exemption to conscientious objectors, the same may be violative of the afore-mentioned article as being a discrimination on grounds of religion.

(b) National Security and Integrity.

The unity and security of a nation require not only that there should be an organised army but also that the people should be loyal to the nation. In order to inculcate loyalty it would be proper for the state to take various measures including legislation and police action. Both in India and the United States laws have been enacted for this purpose. Difficulties arise when a person claims exemption from the loyalty statutes on the ground of religious scruples. Strange as it may seem, such difficulty may arise in case of the customary requirement

of saluting the national flag. Indeed, in both the countries there exists a strong feeling that due homage should be paid to the flag of the nation. In India, the guarantee of religious liberty is not absolute and therefore a claim not to respect the flag on religious susceptibilities is it is submitted untenable.[49] On the other hand, in the United States the problem is somewhat different. Religious liberty occupies a unique position under the Constitution. This has enabled the members of Jehovah's Witnesses to claim that their religion forbids them to salute any thing or entity except the Jehovah God.[50] Accordingly they often assert that salutation of the flag would be a violation of the Divine injunction forbidding worship of any earthly

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49. In India, at present, there is no legislation which punishes disrespect to the national flag. The Central Government is proposing to get a legislation enacted for the purpose which would deal with cases of disrespect to the national flag, the national anthem and the Constitution. See the news item, Law to check cases of insult to flag, The Statesman, April 2, 1969, p. 16. The proposed legislation would provide for punishment of persons who "intentionally prevent the singing of national anthem or cause obstruction to any assembly engaged in such singing." Northern India Patrika, May 8, 1969, p.4, and July 26, 1969, p.7

50. They quote the Old Testament in support of their views:
"Thou shalt have no other Gods before me. Thou shalt not make unto thee any graven image or any likeness of anything that is in heaven above, or that is in the earth beneath, or that is in the water under the earth. Thou shalt not bow down thyself to them nor serve them."
Exodus 20: 3-5.

matter. Dorothy Leoles v. L.M. Landers[61] was the first case where this sort of claim was put forward. The circumstances giving rise to the claim were: In the state of Georgia a resolution was passed by the Atlanta Board of Education requiring all pupils attending public schools to participate in certain patriotic exercises, which included salute to the national flag. The refusal to do so was punishable by imprisonment. In public schools of the state children belonging to Jehovah's Witnesses were, along with others, required to salute the flag. As they refused to do so, they were expelled. The state Supreme Court declined to interfere on the authority of Albert W. Hamilton v. Regents of the University of California,[62] where the United States Supreme Court had upheld the expulsion of students who had refused to enroll themselves for compulsory military training. The appeal to the United States Supreme Court was dismissed for want of a substantial federal question. The Supreme Court adhered to this view in subsequent cases.[63]

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61. 184 Ga 580, 192 SE 218, annot. 120 ALR 655 (1937). Appeal was dismissed for want of substantial federal question, 302 US 656 (1937).

62. 293 US 245 (1934), supra p.150.

63. John Hering v. State Board of Education of the State of New Jersey, 189 A 629 (1937), annot. 110 ALR 383, appeal dismissed 303 US 624(1938), Charlotte Gabrielli v. Dorothy C.Knickerbocker, 306 US 621(1939); William A.Johnson v. Town of Deerfield, 306 US 621 (1939); rehearing denied, 307 US 650 (1939).

In all such cases, the refusal of the United States Supreme Court to interfere was based because of the absence of substantial federal question. At last, however, the Court had to examine the matter at length in _Minersville School District v. Walter Gobitis_.[54] In that case the lower federal Courts had accepted the contention of the Jehovah's Witnesses that if they were compelled to salute the flag, their constitutional right of freedom of conscience would be infringed. The dispute arose as a sequel to the adoption of a regulation by the school board of Minersville requiring all the students attending the school to salute the flag. The children of Walter Gobitis, a member of Jehovah's Witnesses, were expelled from the public school of Minersville as they had refused to salute the flag. Walter Gobitis obtained an injunction from the Federal District Court against the school board.[55] On appeal by the Board, the Circuit Court of Appeals affirmed the lower Court's decision.[56] Thereupon, the Board went in appeal before the United States Supreme Court. The Supreme Court, by an 8 to 1

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54. 310 US 586 (1940).

55. _Gobitis v. Minersville School District_, (D.C. Pennsylvania), 21 F Supp 581 (1937).

56. _Minersville School District v. Walter Gobitis_, (C.C.A. 3d), 108 F 2d 683 (1939).

decision, reversed the judgment of the lower Courts and followed <u>Dorothy Leoles</u> v. <u>J.H. Landers</u>[57] and other subsequent cases.[58]

The majority opinion was delivered by Frankfurter, J. He felt that the problem was one of reconciling a conflict between individual freedom and national security. Even so he was of the opinion that "freedom to follow conscience" is not an absolute freedom.[59-60] He reasoned that national unity being the basis of national security, and the flag being the symbol of national unity, it deserved the highest respect. He said :

> "Conscientious scruples have not, in the course of the long struggle for religious toleration, relieved the individual from obedience to a general law not aimed at the promotion or restriction of religious beliefs. The mere possession of religious convictions ... does not relieve the citizen from the discharge of political responsibilities..... "We live by symbols." The flag is the symbol of our national unity, transcending all internal differences, however large, within the framework of the Constitution."[61]

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57. 184 Ga 580, 192 SE 218, annot. 120 ALR 655, Appeal dismissed 302 US 656 (1937).

58. <u>Supra</u>, fn. 55.

59. <u>Minersville School District</u> v. <u>Walter Gobitis</u>, 310 US 586, 594 (1940).

60. In India article 25 limits the whole of the religious freedom including the freedom of conscience to all the restrictions mentioned therein.

61. <u>Minersville School District</u> v. <u>Walter Gobitis</u>, 310 US 586, 594-5 (1940).

Frankfurter, J., however, expressed doubt as to the utility of a compulsory flag salute as a method of promoting national unity. In his dissenting opinion, Stone, J., was critical of the manner in which national unity was sought to be achieved through compulsory flag salute. He admitted that religious liberty, like any other freedom, was not absolute, and in the interest of the security of the country the state was fully justified in disregarding and overruling a person's religious objections, but he said that it was not necessary to compel students to salute the flag. There were other ways of inculcating the spirit of loyalty and patriotism. Elaborating his point, Stone, J., in his dissent, said :

> "(T)he constitutional guaranties of personal liberty are not always absolutes.. Government ... may make war and raise armies. To that end it may compel citizens to give military service and subject them to military training despite their religious objections. ... But it is a long step, and one which I am unable to take, to the position that Government may, as a supposed educational measure and as a means of disciplining the young, compel public affirmations which violate their religious conscience.... even if we believe that such compulsions will contribute to national unity, there are other ways to teach loyalty and patriotism which are the sources of national unity, than by compelling the pupil to affirm that which he does not believe and by commanding a form of affirmance which violates his religious convictions."[62]

The decision in the case just discussed, on the one

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62. Minersville School District v. Walter Gobitis, 310 US 586, 602-4 (1940).

hand, evoked hostile feelings against Jehovah's Witnesses.[63] And at the same time it did not escape criticism from writers on constitutional law.[64] William F. Anderson criticising the majority judgment said :

> "If individual liberties ... have an intrinsic value worthy of protection, it is difficult to justify a decision which subordinates a fundamental liberty to a legislative program of questionable worth."[65]

On June 22, 1942 the United States Congress enacted Public Law No.623, which defined a pledge of allegiance

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63. The decision was given on June 3, 1940. Between June 12 and June 20 hundreds of physical attacks were made upon the Jehovah's Witnesses in all parts of the country. At some places even the police assisted the mob attacks upon the Witnesses. For a detail see Pfeffer, Church, State and Freedom (1953, Beacon Press, Boston), 525, who has collected some such incidents.

64. Cushman, Constitutional Law 1939-40, 35 American Political Science Review 250, 269 (1941); Powell, Conscience and the Constitution, in Democracy and National Unity (1941); Wilkinson, Some Aspects of the Constitutional Guarantees of Civil Liberty, 11 Fordham L.Rev. 50; Fennell, William G., The "Reconstructed Court" and Religious Freedom: The Gobitis case in Retrospect, 19 New York University Law Quart. Rev. 31 (1941); Green, Liberty under the Fourteenth Amendment, 27 Wash U.L. Quart. 497, 9 International Juridical Association Bulletin 1, Anderson, William F., Freedom of Religion and Conscience-Compulsory Flag Salute, 39 Mich. L.Rev. 149 (1940); 15 St. John's L.Rev. 95. All these references have been taken from West Virginia State Board of Education v. Walter Barnette, 319 US 624, 635 fn.15 (1943).

65. Anderson, William F., Freedom of Religion and Conscience - Compulsory Flag Salute, 39 Mich. L.Rev. 149, 152 (1940).

and prescribed the method of a flag salute.[66] The same year,[67] the Federal District Court in West Virginia refused to follow the *Gobitis* decision[68] in the hope that it would be overruled.[69] On appeal, the United States Supreme Court actually reversed its opinion in the *Gobitis* case[70] by a

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66. "Civilians will show full respect to the flag when the pledge is given by merely standing at attention, men removing the headdress."
Public Law No.623.

67. *Barnette v. West Virginia State Board of Education*, 47 F Supp 251 (1942). The appeal against the judgment is reported at 319 US 624.

68. *Minersville School District v. Walter Gobitis*, 310 US 586 (1940).

69. Giving reasons for not accepting the opinion of the United States Supreme Court in *Gobitis* case, Circuit Judge Parker said for the Court :

    "The developments with respect to the *Gobitis* case, however, are such that we do not feel that it is incumbent upon us to accept it as binding authority."

    Barnette v. West Virginia State Board of Education 47 F Supp 251, 253 (1942). He pointed out that out of the seven judges who were still the members of the Supreme Court and who had participated in the *Gobitis* decision, four had given public expression to the view that the opinion expressed therein was unsound. Stone, J., had given a dissenting opinion in *Gobitis* case itself and 3 judges, Black, Murphy and Douglas, JJ., in a dissenting opinion in *Rosco Jones v. City of Opelika*, 316 US 584, 623, (1942), expressed that the *Gobitis* opinion was unsound. In these circumstances, Circuit Judge Parker reasoned :

    "(W)e feel that we would be recreant to our duty as judges, if through a blind following of a decision which the Supreme Court itself has thus impaired as an authority, we should deny protection to rights which we regard as among the most sacred of those protected by constitutional guarantees."

    Ibid.

70. *Minersville School District v. Walter Gobitis*, 310 US 586 (1940).

6 to 3 majority.[71] Jackson, J., who delivered the majority decision, based his judgment not on religious freedom but upon the freedom of speech. He pointed out that the freedom to speak included a freedom not to speak and a flag salute was a form of speech or communication of ideas. The state could not compel a person to salute the flag, for it would be compelling him to utter what was not in his mind.[72-73] Elucidating his point, he said that the fundamental rights guaranteed under the Constitution could not be restricted even by the legislature except to prevent grave and immediate danger to interests which the state was bound to protect. According to him,

> "One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.... They are susceptible of restriction only to prevent grave and immediate danger to interests which the state may lawfully protect."[74]

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71. West Virginia State Board of Education v. Walter Barnette 319 US 624 (1943).

72. Id., at 634.

73. Though Jackson, J., has based his judgment upon the freedom of speech instead of religious freedom it may be noted that the case could have been decided on the religious freedom clause as well.

74. West Virginia State Board of Education v. Walter Barnette, 319 US 624, 638-9 (1943).

The learned judge criticised the dictum in Gobitis case[75] that "national Unity is the basis of national security." He said that it was difficult to fix the limit to which a person should surrender his liberty for national solidarity. Tracing the history of the idea of national unity from the time of Romans to the present day he showed that national unity itself had been defined differently in different ages, and that "Compulsory unification of opinion achieves only the unanimity of the graveyard."[76] Concluding he said that no officer of the state could "prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion, or force citizens to confess by word or act their faith therein."[77]

Black and Douglas, JJ., in their concurring opinion, agreed that no well-ordered society could give an absolute right of religious liberty. They, however, asserted :

> "(W)e cannot say that a failure, because of religious scruples, to assume a particular physical position and to repeat the words of a patriotic formula creates a grave danger to the nation."78

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75. Minersville School District v. Walter Gobitis, 310 US 586 (1940).

76. West Virginia State Board of Education v. Walter Barnette, 319 US 624, 641 (1943).

77. Id., at 642.

78. Id., at 644.

The same day that the Supreme Court delivered the judgment in Barnette case,[79] it handed down its judgment in R.H.Taylor v. State of Mississippi,[80] in which certain Jehovah's Witnesses were charged with preaching against flag salutation. The Court reaffirmed the Barnette decision and held that in as much as the state could not compel persons to salute the national flag, it could not penalise persons who propagated the view that the flag should not be saluted. In the words of the Court

> "If the state cannot constrain one to violate his conscientious religious conviction by saluting the national emblem, then certainly it cannot punish him for imparting his views on the subject to his fellows and exhorting them to accept those views."[81]

To sum up, the present position in the United States appears to be that a person may refuse to salute the national flag on conscientious grounds. It may, however, be noted that in the interest of national security, the state is free to impose reasonable restrictions upon this liberty.

In India no case has arisen so far on the point. It can, however, be presumed that the freedom of speech and expression guaranteed in article 19(1)(a) includes freedom not to speak. On cases arising on a citizen's right "to form associations and unions", and "to practise any profession, or to carry on any occupation, trade

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79. West Virginia State Board of Education v. Walter Barnette, 319 US 624 (1943).
80. 319 US 583 (1943).
81. Ibid, at 589.

or business"[82] the Indian Supreme Court has held that a positive right includes a negative right. A person who is entitled to carry on a business, is entitled not to carry any business.[83] He cannot be compelled by the state against his own wishes to carry on a business. So also while a person is entitled to form an association, he is free not to form or become a member of any association.[84] On the same analogy, it can be said that the freedom of speech includes a freedom not to speak.[85] Consequently a person cannot be compelled to speak what is not in his mind or what he objects on conscientious grounds. It has been seen above that in the United States the Courts have held that no person

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82. Article 19(1)(c) and (g).

83. Hathising Manufacturing Company, Ahmedabad v. Union of India, AIR 1960 SC 923, Indian Metal and Metallurgical Corporation v. Industrial Tribunal, Madras, AIR 1953 Mad 98, 102.

84. M. Sitharamachary v. The Senior Deputy Inspector of Schools, Rampavaram Ronga, AIR 1958 AP 78, 79, Raja Suryapalsingh v. The Uttar Pradesh Government, AIR 1951 All 674, 698(FB).

85. Basu, D.D., Commentary on the Constitution of India (1961 S.C. Sarkar & Sons, Calcutta), I 333.

could be compelled to compulsory flag salute.[86] The freedom of speech in the United States is subject only to the restriction of a clear and present danger to public peace or to national security. In India article 19(2) provides exceptions to the freedom of speech on various grounds. The state may make a law imposing

> "reasonable restrictions ... in the interest of the security of the state, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence."

No doubt, the expression "reasonable restriction" used in this clause is wider than the rule of a clear and present danger" adopted by the American Courts, yet it is doubtful if the state in India can compel a person to salute the national flag against his own religious scruples, if he has any. Moreover, the state is authorised to put reasonable restrictions in the interests of one or the objects mentioned in article 19(2). It is difficult to assume that such a restriction will advance any of the prescribed objects. Respect to national flag is required to fulfil the object of securing national integrity. The objects like the security of the state, public order or decency, it is submitted, hardly cover such an object.

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86. West Virginia State Board of Education v. Walter Barnette, 319 US 624 (1943) reversing the contrary opinion held in Minersville School District v. Walter Gobitis, 310 US 586 (1940). Discussed supra p.160 et. seq.

(c) Religious Practices in the Schools.

In ancient times both in India and the United States, religion oriented education was imparted in educational institutions. In India during the British period the Christian missionaries started missionary schools in which Bible reading and religious instructions were common features. The government also set up educational institutions but these did not patronise any particular religion. At the same time, in such institutions religious instruction was not prohibited provided religions of different communities were taught in a dispassionate manner. But those schools which were established under different religious sects or attached to different religious denominations imparted their own religious precepts. At the present day, there is a prohibition of religious instruction in educational institutions wholly maintained out of state funds.[87] As to private institutions, article 28 lays down the rule that a

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87. "(1) No religious instruction shall be provided in any educational institution wholly maintained out of State funds.

(2) Nothing in clause (1) shall apply to an educational institution which is administered by the State but has been established under any endowment or trust which requires that religious instruction shall be imparted in such institution.

(3) No person attending any educational institution recognised by the State or receiving aid out of State Funds shall be required to take part in any religious instruction that may be imparted in such institution or to attend any religious worship that may be conducted in such institution or in any premises attached thereto, unless such person or, if such person is a minor, his guardian has given his consent thereto."

Article 28 of the Constitution of India.

person attending an educational institution recognised by the state or receiving aid from the state is not to be compelled to take part in any religious instruction that may be imparted in such institution.

In the United States during the colonial period education was the sole responsibility of the church. The education available in churches was purely of religious type. The students were required to read the Bible and other religious books.[88] Later when education was made compulsory, the religious teaching continued to occupy an important place. For instance, the state of Massachusetts had prescribed compulsory education in 1642. But the pupils were still required "to read and understand the principles of religion."[89]

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88. The history of the old educational system has been described succinctly by Frankfurter, J., in _People of the State of Illinois ex rel. Vashti McCollum v. Board of Education of School District No 71 Champaign County, Illinois_, (333 US 203, 213, 1948):
"Traditionally, organised education in the Western world was Church education. It could hardly be otherwise when the education of children was primarily study of the Word and the ways of God. Even in the Protestant countries, where there was a less close identification of Church and State, the basis of education was largely the Bible, and its chief purpose inculcation of piety. To the extent that the State intervened, it used its authority to further aims of the Church.
"The emigrants who came to these shores brought this view of education with them. Colonial schools certainly started with a religious orientation..."

89. Brown, Samuel W., _The Secularization of American Education_ (1912 Columbia University Press, New York), 17. Quoted in Pfeffer, _Church, State and Freedom_ (1953 Beacon Press, Boston), 276.

Though the First Amendment to the Federal Constitution was ratified by 1791, it was not until 1827 that the demand to eliminate compulsory religious teaching in public schools was made. In course of time, education was given on a mass scale, and children of all sects were admitted in public schools. This made it a little difficult for the schools to teach a particular religion. In 1827, the Massachusetts state passed a law providing that the text-books to be used in the schools should not contain material favouring any religious sect or tenet. This legislation was sponsored by Horace Mann, an educationist and a champion of non-sectarian education in the public schools. It was by his efforts that in 1827, when he was a member of the Massachusetts Senate, the law was passed. When in 1837 he was appointed secretary of the newly constituted state board of education, he enforced the 1827 law with great zeal and impartiality. Though he was against sectarian education, he was not opposed to all religious teaching. He believed that a simple recitation of passages from the Bible was not sectarian. He was in favour of such a type of education which would enable the child to judge for himself according to the dictates of his own reason what his religious obligations were and whither they would lead.[90]

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90. Blau, Joseph L., Cornerstones of Religious Freedom in America (1949, Beacon Press, Boston), pp. 181-2.

It seems that attempts to exclude religious instruction from public schools were by and large limited to the exclusion of sectarian teaching. Bible reading was not objected to. At present, Protestants and Catholics constitute the bulk of population in the United States. The Catholics believe that education is a private affair in which the government should not interfere.[91] They have established their own educational institutions and they insist that the Catholic children must read in Catholic

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91. The representative view of the Catholics may be given in the words of Father William McManus, Assistant Director of the Department of Education of the National Catholic Welfare Conference. He expressed this view, while testifying before a Senate Committee in 1947 :

"In the totalitarian nation, the government is the teacher; the Government controls all the schools which it uses for the mental enslavement of the people. In the free nation, government refrains from direct educational activities."

Blanshard, Paul, *American Freedom and Catholic Power*, (1949, Beacon Press, Boston), 80-81, quoted in Pfeffer, *op.cit.*, p. 293.

schools.[92] As a result of this attitude they have established a large number of church schools for their children.[93] The problems of imparting religious instructions which arise in public schools do not confront in these parochial institutions.[94]

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92. In Arch R. Everson v. Board of Education of the Township of Ewing, Jackson, J., cited the Canon Law of the church to which all Catholics should conform. The main provisions are as follows :

"1372. Catholic children are to be educated in schools where not only nothing contrary to Catholic faith and morals is taught, but rather in schools where religious and moral trainings occupy the first place...

"1373. In every elementary school the children must, according to their age, be instructed in Christian doctrine.

"The young people who attend the higher schools are to receive a deeper religious knowledge, and the bishops shall appoint priests qualified for such work by their learning and piety.

"1374. Catholic children shall not attend non-Catholic, indifferent, schools that are mixed, that is to say, schools open to Catholics and non-Catholics alike...

"1381. The religious teaching of youth in any school is subject to the authority and inspection of the Church."

Woywod, Rev. Stanislaus, _The New Canon Law_ (1940), Canons 1372-4. Quoted in _Arch R. Everson v. Board of Education of the Township of Ewing_, 330 US 1, 22-3 (1947).

93. In _Walter M. Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary_, 268 US 510 (1925), the United States Supreme Court has even held that all those who attend these parochial schools are entitled to an exemption from compulsory attendance at public schools.

94. They, however, do claim that as the burden of the public schools falls upon them also, either their schools should be given government help or else Protestant religious teaching in all form should be forbidden from public schools.

The Protestants, on the other hand, do not have their own educational institutions. They necessarily depend upon the public school system. But they desire to impart religious teaching to their children through the public school system. In spite of the fact that orthodox Catholics hold the view that Catholic students should not read in public schools where Protestant Children study, yet a large number of Catholics read in them.[95] The Catholics claim that if religious teaching is to be imparted in public schools, Catholic tenets should be taught to their children. And if this arrangement is not possible, no religious teaching should be provided in them. The Protestants are divided on this matter. The majority view is that as the Catholics have their own schools, they should have no concern with the Protestant religious teaching in public schools. Such teaching being imparted on a voluntary basis, there is ample freedom for the Catholics. The Catholics on the other hand assert that the public schools are supported by the taxes to which they also contribute. They do not get full return of the taxes which they pay as most of their children do not attend these schools. They, therefore, often claim a share of public school funds for their parochial schools.

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95. It is reported that Dublin's Archbishop John C. McQuaid still sends out an annual pastoral letter warning Catholics that attendance at Trinity College is a moran sin. Though the Trinity College is Protestant, one third of its enrollment is Catholic. Time, August 16, 1968 (Asia ed.), p. 56.

The problem of imparting religious instruction in public schools is surrounded by perplexities. Religious instruction as such has not been permitted in the public schools for a long time. Bible reading though allowed at one time is not permitted now. Help to religion through Release-time programme continues to be regarded as constitutionally valid. Besides there is the problem of the recognition of religious holidays and other religious practices in the educational institutions.

It is a common feature both in India and in the United States that various types of religious practices are held in the school building by the students sometimes even under the patronage of the school authorities. The students of the majority community in any educational institution have an upper hand in the organisation and control of such practices. But this does not mean that the students of the minority community are denied the privilege of observing their religious festivals on the school promises. In India, for example, it is not uncommon even in Universities and colleges to observe Hindu religious functions like Holi and Dewali with great enthusiasm. So also in the United States where the majority of students are Christians, Chrismas[96]

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96. In a prayer case, Steven J. Engel v. William J. Vitale, Douglas, J., in his dissent noted :
"Some communities have a Chrismas tree purchased with the tax-payers' money. The tree, is sometimes decorated with the words "Peace on earth, goodwill to men"... Christmas, I suppose, is still a religious celebration, not merely a day put on the calendar for the benefit of merchants."
370 US 421, 442 fn.8 (1962).

and other religious festivities of Christians are observed with great zeal and enthusiasm. In a recent case where a Chrismas creche was erected on school grounds during Chrismas season, the Court found nothing in it which was illegal or unconstitutional. Instead the Court observed

> "God is the fountainhead from which moral principles spring."[97]

One of the objectives of education is to imbibe high moral principles in the students and if religion has this aim it should not be questioned.

The cases which have occured in American courts over the controversy of prayer and Bible reading[98] in schools show that the observance of religious practices in educational institutions is not, broadly speaking, permissible. Similarly in India, in institutions which are fully supported and run by the state, such practices are likely to come within constitutional prohibition. This may be otherwise in cases of institutions which are not fully supported by the state provided participation in them is not made compulsory.

(d) <u>Prayers at Schools.</u>

In India religious instruction is prohibited in schools wholly maintained out of state funds.[99] Religious

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97. Lawrence v. Buchmueller, 40 Misc 2d 300, 243 NYS 2d 87 (1965), referred to in Symposium, Constitutional Problems in Church State Relations, 61 Northwestern University L.Rev., 777, 813 (1966).

98. Infra, pp. 187-96.

99. Article 28.

instruction includes prayers also. Accordingly, religious prayer is also not permitted in such institutions, except in state controlled institutions established under any endowment or trust providing that such instruction should be imparted. Those institutions, which are not wholly maintained by the state but are only recognised or aided by it, are free to impart religious instruction for the benefit of their students.

In India, a large number of privately run educational institutions get aid from, and are recognised by the state. In such institutions religious instruction can be given on a voluntary basis to those who wish to join them. In practice in these institutions daily prayer at the beginning of the day is held. Though the prayer is not compulsory and attendance for the day is taken only after the prayer is over, students normally attend the prayer and no question has so far arisen about the constitutional propriety of these prayers. Indeed, in one particular instance[100] the state directed a minority institution to provide for a common place, where all teachers, staff and students could meet and recite common prayers. Though the directive of the state was not upheld for other reasons,[101] it seems,

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100. Rev. Sidhrajbhai Sabhai v. State of Gujrat, AIR 1963 SC 540, 543.

101. The state had required the institution to reserve 80 per cent seats for its nominees. The Supreme Court found the direction violative of article 30(1) which guarantees a minority to establish and administer educational institutions of its choice. See pp.89-94 supra.

that there was nothing wrong in such a direction.

While discussing the draft of article 28,[102] Dr. Ambedkar was of the opinion that no religious instruction should be given in educational institutions wholly maintained out of state funds as he thought that this would amount to a taxation. He illustrated this point by reasoning that if a local board was permitted to impart religious instruction, it would mean spending money raised by general taxation upon such instruction, and if the instruction was confined to the children of a particular community, it could be a tax upon persons of those communities whose children did not receive such instruction. He put this point as follows:

> "For instance, if we permitted any particular religious instruction, say, if a school established by a District or Local Board gives religious instruction, on the ground that the majority of the students studying in that school are Hindus, the effect would be that such action would militate against the provisions contained in article 21 (now Art.28). The District Board would be making a levy on every person residing within the area of that District Board. It would have a general tax and if religious instruction given in the District or Local Board was confined to the children of the majority community, it would be an abuse of article 21, because the Muslim community children or the children of any other community who do not care to attend these religious instructions given in the schools would be none-theless compelled by the action of the District Local Board to contribute to the District Local Board funds."[103]

In the United States the question of holding prayers in schools has recently given rise to certain amount of

102. In the Draft Constitution, it was article 21.

103. Dr. B.R.Ambedkar, C.A.D., VII, 883.

controversy. It has even been held that the holding of non-compulsory prayers is unconstitutional.[104] The whole difficulty behind prayers and other forms of religious instruction arises on account of strained relation between the Catholics and the Protestants. The Catholics insist that their children should receive their education in their own parochial school. The Protestants have not cared to establish a system of parochial education for their children. They have therefore to depend upon public schools. Prior to the adoption of the Constitution religious instruction was imparted in almost all the American states. Subsequently religious teaching gradually ceased but the practice of simple Bible reading at the opening of the day continued. As the bulk of population was Protestant and mostly Protestant children studied in the public schools,[105] the Protestant version of the Bible was used in such schools. The Catholics could not tolerate the reading of the Protestant version of the Bible in the public schools particularly if their children were also studying in them. In places where the majority of the population was Catholics, the controversy

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104. Steven I.Engel v. William J.Vitale, 370 US 421 (1962); School District of Abington Township, Pennsylvania v. Edward Lewis Schempp, 374 US 203(1963) and Chamberlin v. Dade County Board of Public Instruction, 377 US 402 (1964).

105. Because the Catholic children were taught in parochial schools.

was more acute. The Catholics objected to the reading of the Protestant version of the Bible. In 1843 Bishop Francis Kenrick of Philadelphia filed a petition with the School Board of the city seeking permission to use the Catholic version of the Bible for Catholic children. It is not known what action the Board took on that petition, but the Protestant version continued to be read as before. It seems that the Bible reading was insisted upon provided the child or his parent did not seriously object to it.[106] The reading of Protestant version of the Bible has kept up the controversy. On this issue there were riots in certain places, and damages caused by one sect on the other. In spite of the agitation on this issue the Protestant version of the Bible reading has not been abandoned.

A number of cases on Bible reading arose before the state Courts and in most of them the practice was found to be constitutional.[107] In Donahoe v. Richards,[108] the school committee of the town of Ellsworth framed a regulation

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106. Pfeffer, Church, State and Freedom (1953 Beacon Press, Boston), pp.374-5, citing Williams, Michael, The Shadow of the Pope (1932, McGraw-Hill Co., New York), p.75.

107. For all such cases see annotation, Bible Distribution or Reading in Public Schools, 45 ALR 2d 742, 744. In some cases, however, even the state courts had taken a contrary opinion, see ibid, at 755.

108. 38 Me 379, 61 Am Dec 256, annot. 45 ALR 2d 742, 760 (1854).

making it compulsory for all children to read the King James' Bible. A certain student was expelled by a school because he refused to read the Bible. The case came up before the Supreme Court of Maine. Though the Court admitted that all persons holding divergent religious views have equal rights, it held that the reading of the Bible was neither an interference with religious belief nor was unconstitutional. In the course of the judgment, the Court observed that if there could be no objection to the reading of the mythology of Greece or Rome on the score of interference with religious belief, the reading of the Bible could not be objected to. In the words of the Court :

> "Reading the Bible is no more an interference with religious belief, than would reading the mythology of Greece or Rome be regarded as interfering with religious belief or an affirmance of the pagan creeds. A chapter in the Koran might be read, yet it would not be an affirmation of the truth of Mohammedanism, or an interference with religious faith."[109]

In another case which arose in Massachusetts the state Court took the same view.[110] The Court rejected the student-petitioner's claim based on his conscientious objection and observed that the Constitution was not infringed merely because a person was required to read a particular version

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109. Ibid.

110. Commonwealth ex rel. Wall v. Cooke, 7 Am L Reg 417 annot. 45 ALR 2d 742, 747 (1859, Mass).

of the Bible. As to the constitutional provision securing liberty of conscience, the Court said that it "was intended to prevent persecution by punishing for religious opinions." It also noted the necessity of the Bible reading:

> "The Bible has long been in our common schools.... It was placed there as the book best adapted from which to teach children and youth the principles of piety, justice, and a sacred regard to truth, love for their country, humanity, and a universal benevolence, sobriety, moderation, and temperance."111

In the state of Ohio in Cincinnati, however, a different view was taken of Bible reading. On account of the differences between the Catholics and the Protestants, the Board of Education passed a resolution, by a vote of 22 to 15, abolishing Bible reading in public schools. In a suit brought before a Cincinnati Court, the resolution was declared void as the Court thought that the exclusion of religious instruction was contrary to the constitutional recognition of Christianity as an essential element of good government. On appeal the decision was reversed by the state Supreme Court. But it may be noted that the state Supreme Court did not hold that the Bible reading was unconstitutional. It took the view that as there was a difference between different sects it was better to

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111. Ibid.

exclude Bible reading.[112]

The Bible reading in the public schools in different forms has continued in nearly all the American states. The question[113] of the reading of a prayer arose pointedly in the United States Supreme Court in 1962 in Steven I. Engel v. William J. Vitale,[114] where the Board of Education had composed a non-denominational prayer[115] to be read in all public schools without comment at the opening of each day's teaching work. The parents of certain students of a public school instituted a suit in the New York state Court questioning the reading of prayer on the ground that the prayer recited in the classes was contrary to their religious faith and convictions. The state Court uphold the power of the Board of Education to use the prayer so long as the procedure adopted did not compel any pupil to participate in the prayer against the objections of his or her parents.

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112. Board of Education v. Minor, 23 Ohio St 211, 13 Am Rep 233, annot. 45 ALR 2d 742, 773 (1872).

113. An attempt was made in Donald R. Doremus v. Board of Education of the Borough of Hawthorne, 342 US 429 (1952), to raise this question by a tax-payer. But the majority of the judges rejected on a technical ground that the appellant being an ordinary tax-payer had no standing to raise such a question.

114. 370 US 421 (1962).

115. The prayer to be read was :
"Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country."
Id., at 422.

But in reversing the decision of the state Court, the United States Supreme Court accepted the contention of the parents and found that the establishment clause did not permit the government from composing prayers officially to be read in public schools. In the words of Black, J., who delivered the majority opinion :

> "(The establishment clause of the first amendment) must at least mean that in this country it is no part of the business of Government to compose official prayers for any group of the American people to recite as a part of a religious program carried on by Government."[116-117]

Shortly afterwards in a number of cases the question of Bible reading came up for decision before the Supreme Court. Two such cases were *School District of Abington Township, Pennsylvania v. Edward Lewis Schempp*[118] and *Chamberlin v. Dade County Board of Public Instruction*.[119] In the former case[120] the Supreme Court reiterated its stand taken in the Prayer case *Steven I. Engel v. William*

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116. *Ibid*, at 425.

117. For criticism of the case, see Sutherland, Arthur E., *Establishment According to Engel*, 76 Har. L.R. 25 (1962); Comment, *The Supreme Court, the First Amendment and Religion in the Public Schools*, 63, Columbia L.R. 73, 97 (1963).

118. 374 US 203 (1963).

119. 377 US 402 (1964).

120. *School District of Abington Township, Pennsylvania v. Edward Lewis Schempp*, 374 US 203 (1963).

J. Vitale[121] and ruled that even Bible reading was an infringement of the establishment clause notwithstanding the fact that it was read without comments. The Court laid down a rule, known as the "neutrality test", as a guide to decide the cases of this type. On the one hand, the Court pointed out that the establishment clause prohibited the state to recognise or give official support to the tenets of any religion, and on the other, the free exercise clause guaranteed the right of every person to freely choose his own way according to his belief. The state should remain neutral. Interference by the state is to be tested by the purpose or the effect of the action of the state. In case the state-action advanced or put a check on religion, it might be found unconstitutional. In the words of the Court :

> "(W)hat are the purpose and primary effect of the enactment ? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution.... (T)here must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion."[122]

In the instant case certain concessions granted by the state showed the religious character of the Bible reading

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121. 370 US 421 (1962).

122. School District of Abington Township, Pennsylvania v. Edward Lewis Schempp, 374 US 203, 222 (1963).

regulation. The rule permitted the alternative use of any version of the Bible. Various versions like the King James, the Catholic Douay and the Revised Standard Versions of the Bible, as also the Jewish Holy scriptures were used. The fact that an amendment was made in the rules permitting non-attendance also showed the religious character of the Bible reading. The Court itself remarked :

> "(T)he State's recognition of the pervading religious character of the ceremony is evident from the rule's specific permission of the alternative use of the Catholic Douay version as well as the recent amendment permitting nonattendance at the exercises."[123]

It was due to this religious character that special arrangements were made in schools by persons of various denominations. The Court pointed out that though "the Bible is worthy of study for its literary and historic qualities" and that "one's education is not complete without a study of comparative religion or history of religion and its relationship to the advancement of civilization,"[124] in the instant case, the reading of verses from the Bible did not fulfill that purpose. The Bible readings challenged in this case were actually religious exercises and as such

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123. Id., at 224.

124. Id., at 225.

violated the First Amendment.

In the latter case, namely Chamberlin v. Dade County Board of Public Instruction[125] a Florida statute required the regular reading of verses from the Bible in assemblies and classrooms in addition to the regular recitation of the Lord's prayer and other devotional songs. At the time when the statute was assailed in the Florida Supreme Court the Schempp case, School District of Abington Township, Pennsylvania v. Edward Lewis Schempp,[126] had not been disposed of. The Court found no unconstitutionality in a mere Bible reading.[127] On appeal the United States Supreme Court, in the light of its judgment in the Schempp case,[128] remanded the Chamberlin case[129] to the Florida Supreme Court. The Florida Court, however, returned the case to

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125. 377 US 402 (1964).

126. 374 US 203 (1963).

127. 143 So 2d 21 (Fla 1962).

128. School District of Abington Township, Pennsylvania v. Edward Lewis Schempp, 374 US 203 (1963).

129. Harlow Chamberlin v. Dade County Board of Public Instruction, 374 US 487 (1963).

the United States Supreme Court as it took the view that the two cases were distinguishable having regard to the legislative history of the statute which pointed to the secular basis of the Act. The Court was of the view that Bible reading was not repugnant to the Constitution as it was "designed to require moral training and inculcation of good citizenship."[130] But the United States Supreme Court again remanded *per curiam*.[131] This time the Florida Court, having no choice, reversed its earlier opinion, but at the same time expressed its dissatisfaction of the ruling in *Schempp* case.[132]

It is obvious that if the state makes education compulsory, it should take care to see that there is proper and all round development of the child. The child may not be given a religious training but he should have a morally orientated instruction in order that he may have a healthy moral outlook on life. In the professed aim of imparting moral training, the education boards in the United States

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130. 160 So 2d 97, 99 (Fla 1964), quoted in Symposium, *Constitutional Problems in Church State Relations*, 61 Northwestern University L. Rev., 797 (1966).

131. *Chamberlin v. Dade County Board of Public Instruction*, 377 US 402 (1964).

132. 171 So 2d 535 (Fla 1965), discussed in Symposium, *Constitutional Problems in Church State Relations*, 61 Northwestern University L. Rev., 797 (1966).

have permitted prayer and Bible reading in the schools. But prayer and the Bible reading are essentially connected with religion giving impetus to a particular religion, namely the Christianity. This might amount to an infringement of the establishment clause of the Constitution. Though it might be difficult in a particular case to decide whether the neutrality test propounded in the Schempp case[133] is disregarded or not, the test is surely violated in the case of Bible reading.[134] Similarly, prayers, even of non-denominational character, are open to objection on the ground that they promote the cause of religion. Those who have no belief in any religion might take the stand that the practice is a hindrance to the free exercise of religion.

In India, the Constitution itself has laid down the principle of state neutrality as a principle which found acceptance in the United States only after a struggle of two centuries. In India, denominational or non-denominational prayers, are prohibited in all government institutions. We have, however, a national anthem, which is sung

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133. School District of Abington Township, Pennsylvania v. Edward Lewis Schempp, 374 US 203 (1963) supra p.192.

134. Since then several cases were brought before the federal district courts and in all of them Bible reading and recital of Lord's Prayer were declared unconstitutional. E.g., Jones v. Allen, 231 F Supp 252 (D.Delaware 1964), Adams v. Engelking, 232 F Supp 666 (D. Idaho, SD 1964).

in schools on different occasions to inspire the feeling of patriotism in the students. Still our courses of study in literature comprise of passages from different religious books which students are expected to study objectively and critically.

The denominational and private institutions are free in India, like their counterparts in the United States, to prescribe prayers and readings from religious books. They are also free to impart religious instruction in their institutions. But in all these cases there is no compulsion upon the pupils to attend them.

(e) Religious Instruction Through Released Time Programme.

As has been stated above, in India religious instruction cannot be given in educational institutions wholly maintained out of state funds. In aided and recognised institutions such instruction can be given provided nobody is compelled to attend it against his will.

In the United States the secularization of public schools under the establishment clause of the Constitution created a problem as to how religious teaching could be imparted to school-going children. The Catholics and the Jews, who have their own parochial school system are not faced with the same difficulty as the Protestants are. In order to resolve various different points of views different methods have been advocated from time

to time. At one time it was considered expedient that the students should be required to take religious training on Sundays. This course, however, did not produce satisfactory results. Frankfurter, J., gives reasons for the failure of the Sunday schools as follows :

> "It was urged that by appearing to make religion a one-day-a-week matter, the Sunday school, which acquired national acceptance, tended to relegate the child's religious education, and thereby his religion, to a minor role not unlike the enforced piano lesson."[135]

Another solution which found favour with the Protestants was to impart religious instruction on week days in the afternoon soon after the secular teaching was over.[135a] The Jews, who had also adopted this system found it practicable, and they were successful. The Protestants were, however, not successful. The religious instruction given in the afternoon, after school hours, was resented to by the students as it prevented them from participating in games. As to this Frankfurter, J., says :

> "(C)hildren continued to be children; they wanted to play when school was out, particularly when other children were free to do so. Church leaders decided that if the week-day church school was to succeed, a way had to be found to give the child his religious education during what the child conceived to be his "business hours."[136]

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135. People of the State of Illinois ex rel. Vashti McCollum v. Board of Education of School District No.71 Champaign County, Illinois, 333 US 203, 221-2 (1948).

135a.The so called dismissed time programme.

136. People of the State of Illinois ex rel. Vashti McCollum v. Board of Education of School District No.71 Champaign County, Illinois, 333 US 203, 222(1948).

The alternative method which was tried was to get the students released for some time during the working hours of the school on one day of the week. According to this system the students were released from the public schools on Wednesday afternoons for about 30 to 45 minutes when the church people imparted them religious instruction. The attendance was not made compulsory. The students were supplied with a card upon which they had to get the consent of their parents for such release. In case consent was not obtained the children were not released and required to take courses in other subjects. The religious instruction was imparted during the released time, either in separate rooms of the school building or in a nearby church building.

The 'released time' programme was very successful and all the major communities of the United States took advantage from this practice. The Catholics, who used to educate their children in their own parochial schools, began to patronise the public schools as the released time programme enabled them to impart religious instruction to their children. In 1948, when the constitutionality of the programme was challenged before the United States Supreme Court in _People of the State of Illinois ex rel. Vashti McCollum v. Board of Education of School District No.71 Champaign County, Illinois_[137] the programme was in

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137. 333 US 203 (1948).

operation nearly all over the United States in one form or the other.[138]

Prior to the McCollum case,[139] the constitutionality of the above programme was tested in several cases before the state courts, but it was found constitutional.[140] There was, however, one exception. A lower court in New York in 1925 held the programme invalid on the ground that the consent cards, which bore the signature of the parents, were printed in the public school printing presses. It was, therefore, held that the printing of cards was a direct aid to religion and as such forbidden under the establishment clause.[141]

As noted above the constitutionality of the 'released time programme' was challenged before the United States Supreme Court for the first time in 1948 in People of the State of Illinois ex rel. Vashti McCollum v. Board of

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138. In 1950 the total number of Sunday and Sabbath schools was 2,46,000 with an enrollment of 2,97,75,000. This number has swelled to 2,82,000 and 4,58,05,000 in 1963. See Statistical Abstract of the United States (1965, U.S. Department of Commerce).

139. People of the State of Illionis ex rel. Vashti McCollum v. Board of Education of School District No.71 Champaign County, Illinois, 333 US 203 (1948).

140. See cases annotated in 167 ALR 1473. In such cases one fact was, however, common that the religious instruction was to be imparted outside the school campus.

141. Stein v. Brown, 125 Misc. 692, 211 NYS 822, annot. 167 ALR 1473, 1474 (1925).

Education of School District No.71 Champaign County, Illinois.[142] The facts were that in 1940 a voluntary association called the Champaign Council on Religious Education was formed by some persons belonging to Jewish, Roman Catholic and Protestant sects in the Champaign County, Illinois. The Council obtained permission from the Board of Education to have classes of religious instruction for public school pupils during regular school hours on one day of the Week. The school teachers issued printed cards to all students and instructed them to get the consent of their parents for religious instruction. All those children who got the consent of their parents were released for 30 minutes on a particular day of the week if they were in the lower grades. Those who were in the higher grade were released for 45 minutes. During this period religious instruction was imparted in different classrooms of the school building.[143] Though the class-teachers were not required to remain in the class while religious instruction was given, most of them used to remain present in the classes. Those children who were not 'released' had to attend regular classes in other parts of the school building.

Mrs. Vashti McCollum, the mother of Terry McCollum,

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142. 333 US 203 (1948).

143. No religious instruction was imparted in the Jewish religion for several years. Id., at 209.

a ten year old student, objected to the religious instruction[144] on the ground that she was an atheist. As he did not participate in such instruction, he was humiliated and ridiculed by his class-fellows and teachers. The Class-teacher often asked Terry to sit idle outside the classroom or in some other vacant part of the building. This treatment created a feeling of bitterness in him. He was dubbed as an atheist.

The United States Supreme Court, by an eight to one decision, declared the system as an infringement of the establishment clause of the First Amendment thus reversing the judgment of the Illinois state Supreme Court, which had unanimously declared the practice constitutional. The majority opinion of the United States Supreme Court was delivered by Black, J. Vinson, C.J., and Murphey, Douglas, Rutledge and Burton, JJ., joined in the opinion of Black, J. Frankfurter and Jackson, JJ., gave their concurring opinions. The only dissenting judgment was of Reed, J.

The United States Supreme Court had already decided in Arch R.Everson v. Board of Education of the Township of Ewing[145] that the establishment clause prohibited all

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144. It may be noted that though the religious instruction imparted in the class of Terry McCollum was Protestantism, it was attended to by the children of 21 faiths, including Catholic, Jewish and Protestant.

145. 330 US 1, 15 (1947).

government aid to religion, even if it was on a non-preferential basis,[146] and that all the limitations under the First Amendment were applicable to the states. The Court on the authority of the Everson case[147] found no difficulty in holding the Champaign system[148] unconstitutional. Black, J., in his majority judgment, held that to permit the use of school hours within the school building for giving instruction in selected religions was an aid to religion which came within the prohibition of the First Amendment. He also pointed out that the state had not only allowed the tax supported public school buildings to be used for the dissemination of religious doctrines but it had also provided pupils to certain sectarian groups for the propagation of their faith. In the words of Black, J. :

> "Pupils compelled by law to go to school for secular education are released in part from their legal duty upon the condition that they attend the religious classes. This is beyond all question a utilization of the tax-established and tax-supported public school system to aid religious groups to spread their faith. And it falls squarely under the ban of the First Amendment as we interpreted it in Everson v. Board of Education."[149-150]

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146. In India if any aid is given on a non-preferential basis it is not unconstitutional. See article 27.

147. Arch R. Everson v. Board of Education of the Township of Ewing, 330 US 1 (1947).

148. The system adopted by the Champaign Council on Religious Education in the instant case, viz., People of the State of Illinois ex rel. Vashti McCollum v. Board of Education of School District No.71 Champaign County, Illinois 333 US 203 (1948). See supra p. 200-1.

149. Arch R. Everson v. Board of Education of the Township of Ewing, 330 US 1 (1947).

150. People of the State of Illinois ex rel. Vashti McCollum v. Board of Education of School District No.71 Champaign County, Illinois, 333 US 203, 209-10 (1948).

Frankfurter, J., giving his concurring opinion said that as religious instruction was given during the school hours and within the school building, the system presented an inherent pressure by the school in the interest of certain religious sects. He said :

> Religious education so conducted on school time and property is patently woven into the working scheme of the school. The Champaign arrangement thus presents powerful elements of inherent pressure by the school system in the intrest of religious sects."[151]

He also pointed out that though there were about 250 sects in the whole country, only some of them gave instruction under the Champaign system which resulted in a discrimination between different sects. He was further of the opinion that even if there was no discrimination, the establishment clause prohibited all aid to religion. The separation of church and state requires that the state should neither help one religion nor even all religions. For him,

> "Separation is a requirement to abstain from fusing functions of Government and of religious sects, not merely to treat them all equally."[152]

It is significant to note that in the concurring opinion of Jackson, J., he took the view that although religion could not be eliminated altogether from education, yet the 'Champaign system' must be held unconstitutional. He put a strong case for religious education in the following words :

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151. *Id.*, at 227.

152. *Ibid.*

"But it would not seem practical to teach either practice or appreciation of the arts if we are to forbid exposure of youth to any religious influences. Music without sacred music, architecture minus the cathedral, or painting without the scriptural themes would be eccentric and incomplete, even from a secular point of view.... One can hardly respect a system of education that would leave the student wholly ignorant of the current of religious thought that move the world society for a part in which he is being prepared." [183]

In his dissent, Reed, J., examined the Everson case[184] relied upon by the majority in the instant case. He was critical to the Court's view in that case that the bus transportation of the parochial school children was valid. He, however, accepted the broad principles set forth in that case. He was also critical of the majority view in the instant case. On the facts of the McCollum case,[185] Reed, J., did not agree that the petitioner or her son had any legitimate grievance as the religious instruction imparted in the school was voluntary. There was, therefore, nothing improper in the released time programme.

The opinion expressed in the McCollum case was not clear as to its application to the various types of 'released time' programmes prevalent in different parts of the country.

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183. Id., at 235-6.

184. Arch R. Everson v. Board of Education of the Township of Ewing, 330 US 1 (1947).

185. People of the State of Illinois ex rel. Vashti McCollum v. Board of Education of School District No.71 Champaign County, Illinois, 333 US 203 (1948).

It could either be argued that all 'released time' programmes were invalid or that only those programmes which took place in the school buildings were objectionable.

Within a period of four years another case on the 'released time' programme came before the United States Supreme Court. It was _Zorach v. Andrew G. Clauson_.[156] The facts were, broadly speaking, almost the same as in the _McCollum_ case[157] except that the religious instruction was imparted not in the school building but in buildings belonging to different religious groups outside the school campus. Unlike the _McCollum_ case where the plaintiff was an atheist, the petitioners were church affiliated people. One of the petitioners, Tessim Zorach, was a parishioner of the Holy Trinity Episcopal Church. The other petitioner, Esta Gluck, was an active member of the American Jewish Congress and the president of the parent-teachers' association of her local school district. In the New York City, where the children of these two petitioners attended public schools, the released time programme was being used. In 1940, a statute was enacted in the state of New York permitting the released time programme. A large number of regulations were framed by the state Commissioner of Education and the

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156. 343 US 306 (1952).

157. _People of the State of Illinois ex rel. Vashti McCollum v. Board of Education of School District No.71 Champaign County, Illinois_, 333 US 203 (1948).

New York City Board of Education concerning the programme. Under these regulations the religious instruction could be given outside the school. The students could be excused from their regular classes only on a written and signed request of the parents. The regulations also prescribed courses of religious study, the requirement of attendance, and the maximum time of release. The students in the schools were required to be 'released' only in the last hour of a day in a week.

The petitioners' main contention was that according to the McCollum case[158] all forms of released time system, as distinguished from dismissed time system, were per se unconstitutional. The lower Courts repelled this contention and upheld the released time programme. They distinguished the McCollum case on the ground that in the instant case the religious instruction was imparted outside the school building, while in the McCollum case it was given within the school building.

On appeal the United States Supreme Court upheld the constitutionality of the programme by a vote of six to three. Douglas, J., pronounced the majority judgment. Distinguishing the McCollum case from the one before the Court, he said that in the former case not only the

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158. People of the State of Illinois ex rel. Vashti McCollum v. Board of Education of School District No. 71 Champaign County, Illinois, 333 US 203 (1948).

classrooms were used but the public school teachers induced the students to attend religious classes.[159] While in the case before the Court both these features were absent. He asserted that religious freedom could not be taken to imply hostility to religion. If the parents desired for the 'release' of the child for religious instruction and the school authorities made arrangements for such release, it would not amount to an infringement of establishment clause of the Constitution. In his own words:

> "Here as we have said, the public schools do no more than accommodate their schedules to a programme of outside religious instruction. We follow the McCollum case. But we cannot expand it to cover the present released time program unless separation of Church and State means that public institutions can make no adjustments of their schedules to accommodate the religious needs of the people. We cannot read into the Bill of Rights such a philosophy of hostility to religion."[160]

He emphasized that by meeting the demand of the parents the authorities merely provided facilities to enable the students to participate in the religious instruction. The learned judge laid stress on the fact that the system did not force any one to attend the religious classes. It was at the option of a student to take the religious instruction or not

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159. In the McCollum case in spite of the theoretically voluntary nature of attendance, cent per cent students (except the plaintiff's son) participated in the programme.

160. Zorach Zorach v. Andrew G.Clauson, 343 US 306, 315 (1952 per Douglas, J.). Emphasis supplied.

as he chose to do. He said :

> "No one is forced to go to the religious classroom and no religious exercise or instruction is brought to the classrooms of the public schools. A student need not take religious instruction. He is left to his own desires as to the manner or time of his religious devotions, if any."[161]

Black, Frankfurter and Jackson, JJ., gave their dissenting opinions. Black, J., who it might be recalled had delivered the majority judgment in the McCollum case[162] said that there was hardly any difference in McCollum case and the one before him. The principle 'laid in the McCollum case' established that in a compulsory public school system, the students were not to be 'released' for religious instruction. He quoted his own statement from the McCollum case :

> "Pupils compelled by law to go to schools for secular education are released in part from their legal duty upon the condition that they attend the religious classes. This is beyond all questions a utilisation of the tax-established and tax-supported public school system to aid religious group to spread their faiths. And it falls squarely under the ban of the First Amendment...."[163]

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161. Id., at 311.

162. People of the State of Illinois ex rel. Vashti McCollum v. Board of Education of School District No.71 Champaign County, Illinois, 333 US 203 (1948).

163. Tessim Zorach v. Andrew G. Clauson, 343 US 306, 316 (1952). Quoted from People of the State of Illinois ex rel. Vashti McCollum v. Board of Education of School District No.71 Champaign County, Illinois, 333 US 203, 209-10 (1948), supra p. 203 fn. 150.

As to the use or non-use of the school building for religious instruction, he was of the opinion that the principle laid down in the *McCollum* case had no direct bearing on the use of school buildings. Its use might be an additional ground for the programme being found unconstitutional. He further quoted from the *McCollum* case the following extract to show that the use of the school building was no ground for the decision in that case:

> "Here *not only* are the State's tax-supported public school buildings used for the dissemination of religious doctrines. The State *also* affords sectarian group an invaluable aid in that it helps to provide pupils for their religious classes through the use of the State's Compulsory School machinery. *This* is not separation of Church and State."[164]

The state compelled children to attend secular schools. Any use of such coercive power by the state to help any religious sect or to even prefer all religious sects over non-believers, or vice versa is forbidden by the First Amendment. As such he concluded that the New York system was a clear violation of the establishment clause. He said :

> "In considering whether a state has entered this forbidden fold the question is not whether it has entered too far but whether it has entered at all. New York is manipulating its compulsory education laws to help religious sects get pupils. This is not separation but combination of Church and State.... State help to religion injects political and party prejudices into a holy field. It too often substitutes force for prayer, hate for love, and persecution for persuasion. Government should not be allowed, under cover of the soft euphemism of "co-operation", to steal into the sacred area of religious choice."[165]

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164. *Id.*, at 316, quoted from *People of the State of Illinois ex rel. Vashti McCollum v. Board of Education of School District No.71 Champaign County, Illinois*, 333 US 203, 212 (1948). Emphasis supplied by Black,J., in his dissent in the *Zorach* case.
165. *Id.*, at 318-320.

In his dissenting judgment Frankfurter, J., was critical of the majority judgment delivered by Douglas, J. He said that the main difference was that all the children were not let out of the school but only some of them went for religious instruction. If the classes were dismissed for any reason, or even without reason, there would be no unconstitutionality. But in the instant case some students were released for religious instruction during school hours, while others were retained for secular teaching. According to him,

> "The essence of this case is that the school system did not "close its doors" and did not "suspend its operations." There is all the difference in the word between letting the children out of school and letting some of them out of school into religious classes."166

In sum, he said, the formalized religious instruction was substituted for secular school activity and those who did not attend the religious instruction were kept inside the school. This amounted to an aid to religion which was proscribed by the establishment clause. He pointed out that the unwillingness of the promoters of the released time programme to utilise the dismissed time programme showed that the compulsory school system was of use in imparting religious instruction. He hoped that in future the Supreme Court might change its view as the majority

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166. Id., at 320.

opinion had not disapproved of the judgment in the McCollum case,[167] and held that all released time programmes were invalid.

Jackson, J., in his dissenting judgment observed that as a result of the majority opinion, the wall which the Court was professing to erect, became more warped and twisted, which could not solve the consitutional problem. In his own words :

> "The distinction attempted between that case and this is trival, almost to the point of cynicism, magnifying its nonessential details and disparaging compulsion which was the underlying reason for invalidity.... The wall which the Court was professing to erect between Church and State has become even more warped and twisted than I expected. Today's judgment will be more interesting to students of psychology and of the judicial processes than to students of constitutional law."[168]

He was of the view that the 'released time' programme amounted to coercion on the part of the state and therefore obnoxious. It meant compelling the students to attend the public schools and then releasing some of them on condition that they devoted the released time to sectarian religious programme. Those who did not go in for such instruction had to remain in the school notionally for secular education, even though the classes were suspended during such period.

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167. People of the State of Illinois ex rel. Vashti McCollum v. Board of Education of School District No. 71 Champaign County, Illinois, 333 US 203 (1948).

168. Tessim Zorach v. Andrew G. Clauson, 343 US 306, 325 (1952).

The majority judgment of *Zorach* case[169] is open to several objections. In the celebrated case of *Arch R.Everson v. Board of Education of the Township of Ewing*[170] it was held that the state could neither help one religion nor even all religions.[171] In contrast, the decision in *Zorach* case is a help and support to organised religions. No doubt, Douglas, J., who delivered the majority opinion, is correct, when he says that the Bill of Rights does not profess 'a philosophy of hostility to religion',[172] but it is submitted, he has failed to appreciate the various circumstances existing in the instant case which helped organised religions to a large extent. He distinguishes the *McCollum* case[173] from the *Zorach*,[174] reasoning that in the former, public school teachers had helped in the attendance of the students, whereas in the latter, there was no assistance, except that the children were released at the request of their parents.

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169. *Tessim Zorach v. Andrew G.Clauson*, 343 US 306 (1952).
170. 330 US 1 (1947).
171. *Tessim Zorach v. Andrew G.Clauson*, 343 US 306 (1952).
172. *Id.*, at 313, supra p.208.
173. *People of the State of Illinois ex rel. Vashti McCollum v. Board of Education of School District No.71 Champaign County, Illinois*, 333 US 203 (1948).
174. *Tessim Zorach v. Andrew G. Clauson*, 343 US 306(1952).

But it may be noted that a student is released not only at the request of his parents, but also if he has registered himself for religious education to be operated by duly constituted religious bodies. In this context one has to take into account the position of those who want to get the religious lessons at home or who do not believe in any religion at all. They are not excused from their regular classes. Then the principal or teacher of the secular schools have to cooperate in releasing children from the school.[175] The attendance reports of pupils who have been released are to be filed by the religious teachers to the principal or teacher of the secular education.

In another Supreme Court case, Steven I.Engel v. William I.Vitale,[176] the Court held that the reading of even a non-denominational prayer was unconstitutional. The main reasoning of the judgment was that the prayer invoked and accepted the authority of a Supreme Being, the God. This could reasonably be objected to by those who did not believe in the existence of God. By the same token any facility

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175. Rules in this respect were :
"They (Principal or teacher in charge of a public school) must obtain and file cards of excused children, prepare, distribute, and keep current lists for classroom teachers of released time students, supervise an additional classroom dismissal; and secure and check absence reports of religious centres."
Facts collected from affidavits filed by several teachers, Note, Released Time Reconsidered : The New York Plan is Tested, 61 Yale L.J. 405, 412(1952).

176. 370 US 421 (1962).

hich the public school gave for promotion of religion
y releasing students could be objected to by the non-
elievers. Though in Zoragh case[177] the petitioners were
ot non-believers, still they believed in those religions,
or which no religious classes were arranged. The 'released
ime' programme helped only those religionists who could
old religious classes for the children of their faith.
s the holding of such classes in each locality might not
e helpful for those religions which are not properly
rganised it can be said that not only the non-believers
ere discriminated but also the people having affiliations
o such religions were practically excluded from this type
f aid.

Further, as pointed out by Frankfurter, J., in his
issent that the dismissed-time programme could not find
avour with religious minded persons because all the stu-
ents would be released a little before the closing of the
chool on one day in each week and they instead of attend-
ng religious courses might choose to go their homes. The
hole purpose thus might be defeated.[178] It has been felt
hat the 'released time' programme is detrimental to the

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77. Tessim Zoragh v. Andrew G. Clauson, 343 US 306 (1952).

78. Because, after such a release the student gets time for recreation. In the New York system if the students do not attend religious classes, their secular teaching would have continued. See note, Released Time Reconsidered: The New York Plan is Tested, 61 Yale L.J. 405, 414 (1952).

interests of students attending religious instruction in so far as they are not given regular coaching during 'released time' programme. Further, the programme can be used as an indirect means of compelling the students to take religious instruction. For example, the school authorities might prescribe difficult exercises for those who do not participate in religious instruction and thereby putting pressure upon them to take religious instruction.[179] The programme can also be a means of inducing the students not to take religious instruction as, for example, when easy exercises are prescribed for them in the classes during the 'released time' programme. Similarly, if some useful knowledge is imparted, the released students would suffer. If no useful teaching is done, the non-released students could very reasonably feel that they have to suffer because of the 'released' students. All this shows that the school authorities have to devise ways and means to make the 'released time' programme a success. It is obvious that without their help and cooperation, the programme cannot achieve the results. In case the authorities cooperate this amounts to a support to

179. In one of the released time programmes, it was actually suggested that the school authorities be requested to refrain from scheduling courses or activities of compelling interest or importance for non-released students. See People of the State of Illinois ex rel. Vashti McCollum v. Board of Education of School District No.71 Champaign County, Illinois, 333 US 203, 223 (per Judgment of Frankfurter, J.).

religion which is not permissible under the establishment clause as interpreted in *Everson* and *McCollum* cases.[180]

To sum up, the First Amendment to the United States Constitution has been held not to prohibit the release of children for religious instruction by non-state instructors of their own sect during school hours. The separation of the church from the state was not to import hostility to religion. The difficulties arise in current controversies whether non-preferential state aid to sectarian schools violates the separation. In *Steven I. Engel v. William J. Vitale*,[181] the Supreme Court held it unconstitutional for a public education authority to require a non-denominational prayer to be recited by teachers, even though children were not compelled to attend the ceremony. In another case, *School District of Abington Township, Pennsylvania v. Edward Lewis Schempp*,[182] the Supreme Court held that the required bible reading or recitation of the Lord's Prayer in public school curricula violated the First Amendment. The dissent raised the question whether such a holding amounted to an interference with the free exercise of religion by citizens who desired such readings for their children.

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180. *Arch R. Everson v. Board of Education of the Township of Ewing*, 330 US 1 (1947), *People of the State of Illinois ex rel. Vashti McCollum v. Board of Education of School District No.71 Champaign County, Illinois*, 333 US 203 (1948).

181. 370 US 421 (1962).

182. 374 US 203 (1963).

(g) Freedom from Religion.

The freedom of religion enshrined both in the Constitutions of India and of the United States includes by implication freedom from religion. Article 25 of our Constitution declares that all persons are equally entitled to freedom of conscience. Similarly, the United States' Constitution guarantees the free exercise of religion. In India, not only the freedom of religion of an individual is included in his freedom of conscience, but something more is guaranteed to him. Actually the Constitution puts the individual above religion. The opening words of article 25 subordinates religious freedom to the individual's liberty and other freedoms guaranteed in other provisions of the third part of the Constitution. India has its own problems concerning religious practices. Some of these practices are detrimental to the interests of society. The framers of the Constitution were well aware of such practices. They knew that a large number of people belonging to lower caste were treated unequally by persons of higher caste. If every religion had been left free to do whatever it liked, persons of higher caste who were at the helm of religious affairs might have continued to keep persons of lower caste under subordination and in a state slavery. Therefore the liberty of the individual guaranteed in the Constitution has been accorded a higher place and religious freedom has been made subordinate to it. If a person has complete freedom of conscience, he may or may not accept the belief

of others. He might have a faith in some religion or in none. The guarantee is not confined to freedom of religion but embraces freedom of conscience as well. It, therefore, follows that under the Indian Constitution, a person enjoys not only freedom of religion but also the right of freedom from religion. Professor P.K. Tripathi puts it in the following words :

> "In this scheme of liberty there is guaranteed to the individual not only freedom of religion, but, where religion tended to become a menace to his liberty and dignity, there is also guaranteed to him freedom *from* religion; because without the latter the former guarantee alone will be incomplete, and even meaningless."[183]

The question about freedom from religion arose recently in an excommunication case.[184] Though the majority opinion held that the Bombay Prevention of Excommunication Act, 1949,[184a] prohibiting the practice of excommunication, was ultravires article 26(b), Sinha, C.J., was critical of the majority opinion in his dissent. He discussed the right of the freedom of conscience guaranteed under article 25(1) to the individual, and agreed with the contention of the state that a person who was excommunicated became an outcaste for all practical purposes. Such a person suffered from various disabilities as, for example, he was prohibited to use places of worship or burial ground. Other members of the community

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183. Tripathi, P.K., *Secularism: Constitutional Provisions and Judicial Review*, 8 JILI 1, 6 (1966).

184. *Sardar Syedna Taher Saifuddin Saheb* v. *State of Bombay*, AIR 1962 SC 853, discussed in detail *infra* at p.460.

184a. Bombay Act 42 of 1949.

could not have any contacts, social or religious, with an excommunicated member. The learned Chief Justice was of the view that the Act was valid, as it was only aimed at fulfilling the right of individual liberty guaranteed in article 25(1), and the right to follow the dictates of one's conscience. In his own words:

"(T)he Act is intended to do away with all that mischief of treating a human being as a pariah, and of depriving him of his human dignity and of his right to follow the dictates of his own conscience. The Act is, thus, aimed at fulfilment of the individual liberty of conscience guaranteed by Art. 25(1) of the Constitution, and not in derogation of it."[185]

In the United States, since the adoption of the Constitution, a person is free to adopt a religion of his choice or he may keep himself aloof from all religions.[186] The Constitution prohibits a religious test for the appointment in public offices under the United States.[187] The oath required for the President and persons holding other important public offices do not require any religious belief but simply require that they would faithfully execute the work assigned

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185. Id., at 806.

186. Prior to the adoption of the Constitution some state Constitutions required the worship of a Supreme Being by all men in society. E.g., Massachusetts Constitution (1780) provided:
"(It) is the right as well as the duty of all men in society, publicly and at stated reasons, to worship Supreme Being..."

187. "(No) religious test shall ever be required as a qualification to any office or public trust under the United States."
Article VI section 3, United States Constitution.

them under the Constitution.[188] The history behind the religious freedom clause of the Constitution also shows that was not intended by the framers of the First Amendment to make religious belief obligatory. It has been admitted by all hands that the United States Constitution guarantees the freedom from religion.[189]

The question of freedom from religion recently arose in the United States in Roy R. Torcaso v. Clayton K. Watkins.[190] In that case, the state of Maryland required a declaration of one's belief in the existence of God[191] for holding a public office. The appellant was appointed to the office of Notary Public by the Governor of Maryland. Before a commission could be issued he was asked to declare his belief in

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188. E.g., "I do solemnly swear (or affirm)."
Article II section 7 of the U.S. Constitution.

189. "Freedom of religious belief necessarily carries with it freedom to disbelieve...."
In re Robert Harold Scott, Federal Communications Commissioner, Memorandum Opinion and Order, No.96050, July 19, 1946. Quoted in Pfeffer, Leo, Church, State, and Freedom (1953, Beacon Press, Boston), p.499. See also, Harry E. Groves, Religious Freedom, 4 JILI 191, 203 (1962):

"(T)he courts in the United States.... are careful to preserve the personal rights of irreligious, for the freedom not to believe is held to be a part of religious freedom of belief."

190. 367 US 488 (1961).

191. "(N)o religious test ought ever to be required as a qualification for any office of profit or trust in this State, other than a declaration of belief in the existence of God...." (Emphasis added).
Article 37 of the Declaration of Rights of the Maryland Constitution. Id., at 489. Cf., article VI s.3 of the United States Federal Constitution, supra fn. 187.

the existence of God as required by the state Constitution. On his refusal to take such an oath, the commission was not issued. His action in a Maryland Circuit Court and in the state Court of Appeals was rejected. The Court of Appeals in affirming the rejection by the Circuit Court held that

> "the state Constitutional provision (was) self executing and require(d) declaration of belief in God as a qualification for office without need for implementing legislation."[102]

On appeal, the United States Supreme Court was unanimous on the point that in the light of article VI of the Federal Constitution, the provisions of the state Constitution which required a religious belief, were unconstitutional. The Court cited with approval the following extract from the Everson case:

> "The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church.... Neither can force nor influence a person to go to or remain away from church against his will or force him to profess a belief or disbelief in any religion."[103]

Further it held,

> "neither a State nor the Federal Government can constitutionally force a person to profess a belief or disbelief in any religion."[104]

The Court below had taken the view that the appellant was not coerced to believe or disbelieve under a threat of

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102. Quoted in Roy R. Torcaso v. Clayton K. Watkins, 367 U.S. 488, 489 (1961).

103. Arch R. Everson v. Board of Education of the Township of Ewing, 330 U.S. 1, 15 (1947), cited id., at 492-3. Emphasis added.

104. Roy R. Torcaso v. Clayton K. Watkins, 367 U.S. 488, 495 (1961).

punishment. It had admitted that unless a person had made a declaration of belief he would not be allowed to hold a public office, but it reasoned that he was not compelled to hold such office. To this the Court cited two earlier cases of the United States Supreme Court, Robert M. Wieman v. Paul M. Updegraff[195] and United Public Workers of America v. Harry B.Mitchell,[196] to the effect that the fact that a person was not compelled to hold public office was no excuse for debarring him from office by imposing conditions forbidden by the Constitution. In these cases it was pointed out that even the Congress could not pass a law providing that a federal employee must attend a mass or take an active part in missionary work.[197] He also quoted the Court's view in Jesse Cantwell v. State of Connecticut that what the Congress could not do under the First Amendment, the states could not also do by reason of the Fourteenth Amendment.[198]

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195. 344 US 183 (1952).

196. 330 US 75 (1947).

197. United Public Workers of America v. Harry B.Mitchell, 330 US 75, 100 (1947).

198. He quoted the following extract from the Cantwell case: "The First Amendment declares that Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. The Fourteenth Amendment has rendered the legislatures of the states as incompetent as Congress to enact such laws..."
Jesse Cantwell v. State of Connecticut, 310 US 296, 303 (1940).

In *Margaret M. McGowan v. State of Maryland*,[199] a Sunday-closing case, the appellant raised a constitutional question that the requirement of the state to close all business on Sunday being Lord's day violated the establishment clause of the First Amendment. The United States Supreme Court by a 6 to 3 majority rejected the contention and held that the purpose and effect of the Sunday law was not to aid religion but to set aside Sunday as a day of rest and recreation. But Douglas, J., in his dissent was critical of this approach. While he did not agree that the state could choose only Sunday as a rest day, he discussed at length the free exercise clause of the Constitution. He said that the freedom under the First Amendment "includes freedom *from*[200] religion with the right to believe, speak, write and advocate antireligious programs."[201]

Concluding, we find that the freedom to believe includes freedom to disbelieve. While a person is free to have faith in any religion, he is also free to have faith

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199. 366 US 420 (1961).

200. Emphasis supplied by Douglas, J., himself.

201. *Margaret M. McGowan v. State of Maryland*, 366 US 420, 564 (1961).

in no religion. The state cannot force a person to profess a belief or disbelief in any religion. It cannot make laws aiding any religion or even all religions as against non-believers. So also it cannot aid a religion which is based on a belief of the existence of God as against those religions founded on different beliefs. In neither country appointments to public offices can be made on grounds of a religious belief.

Chapter VII

Profession of Religion.

The right to profess religion is next to the right of freedom of conscience. A right to profess religion means a right to manifest one's religion, or belief by way of teaching, practice and observance.[1] The freedom of conscience is something internal but nevertheless it is natural that there should be outward manifestation of ideas which lie hidden in the conscience of a man. Same case is with religious beliefs. They take their shape internally in the mind of the believer. Here also there is a temptation to impart to others what one sincerely believes even though he might not wish to propagate his religious views. In this connection, it is relevant to define three distinct, though connected terms, namely, propagation, practice of religion and profession. In the case of 'propagation' a person by persuasion or otherwise induces another person to accept his religious beliefs so that his acceptance

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1. Cf. articles 18 and 19 of the Universal Declaration of Human Rights, 1948 which say :

   "Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private to manifest his religion or belief in teaching, practice, worship and observance.

   "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers."

might do good to him. A person practises religion when he does something in accordance with the tenets of his religion for his own good. A person is said to profess religion when there is no intention to show path of salvation to others but simply implies a declaration of one's own faith. For example, taking out a religious procession, putting on some specific kinds of clothes, wearing a sacred thread,[2] keeping a beard or a lock of hair on the crown of the head would amount to profession of religion. Another example is the provision of the Constitution that the wearing and carrying of Kirpans should be deemed to be included in the profession of the Sikh religion.[3]

The nature and scope of profession of religion arose recently in the two cases before the Indian Supreme Court.[4] In both the cases the Presidential Order[5] relating to the reservation of certain seats for the Scheduled Castes for election to Lok Sabha and state Assemblies made under article 341(1) of the Constitution was considered. Having

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2. Sheo Shankar v. Emperor, AIR 1940 Oudh 348.
3. Explanation 1 to article 25.
4. Punjabrao v. D.P. Meshram, AIR 1965 SC 1179, and R. Rajagopal v. C.M. Arumugam, AIR 1969 SC 101.
5. The Constitution (Scheduled Castes) Order, 1950.

provided for reservation of certain seats for the Scheduled Castes, the Order laid down that the reservation applied only to a person of Scheduled Caste who professed Hindu or Sikh religion. In Punjabrao v. D.P. Meshram[6] the candidate who had won the election originally belonged to a Scheduled Caste. Later he embraced Buddhism. He claimed that in spite of his conversion he continued to be a member of the Scheduled Caste. The Supreme Court repelled his contention and held that on conversion he ceased to be a member of the Scheduled Caste. The Court approved the view of earlier Bombay High Court case[7] that the meaning of the phrase "profess a religion" is "to enter publicly into a religious state." In the opinion of the Court a public declaration was necessary in the case of profession of a religion. The Court observed :

> "It would thus follow that a declaration of one's belief must necessarily mean a declaration in such a way that it would be known to those whom it may interest. Therefore, if a public declaration is made by a person that he has ceased to belong to his old religion and has accepted another religion he will be taken as professing the other religion. In the face of such an open declaration it would be idle to enquire further as to whether the conversion to another religion was efficacious. The word "profess" in the Presidential Order appears to have been used in the sense of an open declaration or practice by a person of the Hindu (or the Sikh) religion."[8]

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6. AIR 1965 SC 1179.

7. Narayan Waktu Karwadi v. Punjabrao Hukam Shambharkar, AIR 1958 Bom 296.

8. Punjabrao v. D.P. Meshram, AIR 1965 SC 1179, 1184.

In the instant case, as the appellant had made an open declaration of his conversion, the Court held that he was no longer a member of the Scheduled Caste and therefore not entitled for a reserved seat.

Of the same import is S. Rajagopal v. C.M. Armugam.[9] In this case a Hindu Adi Dravidas after having embraced Christianity returned to Hindu fold. As reconversion was not accompanied by any formal public declaration, the Court was urged to presume it by his conduct. The facts were that after conversion to Christianity in 1949, the appellant married a Hindu Adi Dravida woman in 1958. The children of the marriage were brought up as Hindus. He got the entry into his service cards altered from Christianity to Adi Dravida Hindu. In the general elections of 1962 and 1967 he stood as a candidate from a Reserved Scheduled Caste constituency as an Adi Dravida Hindu. Reiterating the test laid down in Punjab Rao v. D.P. Meshram[10] that there should be a public declaration, the Court held that the facts constituted to a public declaration that he professed the Hindu religion.

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9. AIR 1969 SC 101.

10. AIR 1965 SC 1179.

Another question raised but left undecided by the Supreme Court was how to prove the caste of a person converted into Hinduism. Does on reconversion to Hinduism a person embraces his original caste of birth ? For example, when a person renounces Hinduism and adopts Christianity, he goes out of his caste. But when he reverts back to Hinduism, the Supreme Court opined that he "cannot claim that he automatically reverted to a membership of that caste."[11] The Supreme Court, however, cited several High Court cases[12] to the effect that on reconversion a person could again become a member of the caste in which he was born provided he is accepted by the members of his caste. Though this question was directly involved yet the Supreme Court did not give any opinion on the point.[13] Bhargava, J., who delivered the

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11. S. Rajagopal v. C.M. Armugam, AIR 1969 SC 101, 107.

12. Administrator-General of Madras v. Anandachari, 9 Mad 466 (1886), Gurusami Nadar v. Irulappa Konar, AIR 1934 Mad 630, Mrs. Agnes Dorothy Vermani v. Mr. Bryant David Vermani, AIR 1943 Lah 51 (SB), Goona Durgaprasad Rao v. Goona Sudarsanaswami, AIR 1940 Mad 513, Election petitions of Kothapalli Narasayya v. Jammana Jogi, No.9 of 1967, K. Narasimha Reddy v. G. Bhupathi, No.18 of 1967, and Allam Krishnaiah v. Orepalli, No.10 of 1967, decided by the Andhra Pradesh High Court on 29-8-1967, 29-9-1967 and 5-9-1967 respectively, and K. Karunalai v. M. Alagaram, No. 9 of 1967 decided by the Madras High Court on 5-10-1967. Id., at 108-9.

13. Id., at 109-10.

opinion of the Court, said that even if the test evolved by the High Courts that on reconversion a person took to his original caste that test could not be applied to the case before the court because the appellant had not been accepted by the members of his original caste. He was, therefore, not entitled to be nominated from the reserved Scheduled Caste constituency.

The question of profession of religion was also involved in the cow-slaughter case, *Mohammad Hanif Quareshi v. State of Bihar.*[14] In that case the petitioners contended that Muslim religion enjoined every person to sacrifice one goat on the Bakr-Id day. In the alternative seven persons together may even sacrifice one cow.[15] It was claimed that since time immemorial the Indian Muslims were allowed to sacrifice cows and that this practice, even if not enjoined, was "certainly sanctioned by their religion" and as such this amounted to be a profession and practice of religion protected by article 25."[16] The Supreme Court, however, did not accept this

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14. AIR 1958 SC 731. *Infra* p. 363 et. seq.

15. "The sacrifice established for one person is a goat, and that for seven, a cow or a Camel. If a cow be sacrificed for any number of people fewer than seven, it is lawful; but it is otherwise if sacrificed on account of eight." *The Hedaya*, translated by Charles Hamilton (1957 New Book Company, Lahore), LIII, p.592.

16. *Mohammad Hanif Quareshi v. State of Bihar*, AIR 1958 SC 731, 740.

contention. It said that since the provision of cow-sacrifice was made in Muslim Law as an alternative to sacrifice of goat, the practice was not obligatory. To this, the petitioners contended that a person with six other members of his family might afford to sacrifice a cow but might not be able to afford to sacrifice seven goats. So there might be an economic compulsion even if there would be no religious compulsion.[17] The Court rejected this plea also. It accepted the contention of the state that many Muslims do not sacrifice a cow on the Bakr-Id day. Going back to the Muslim period of Indian history, the Court said that a number of Muslim rulers had prohibited the slaughter of cows.[18] Moreover three members of the Gosamvardhan Enquiry Committee set up by the U.P. Government were Muslims and they all concurred in the unanimous recommendation for total ban on slaughter of

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17. *Id.*, at 740.

18. The Court noted that Moghul Emperor Babar not only prohibited cow slaughter but also had directed his son Humayun to follow that example. Similarly Emperors Akbar, Jehangir, and Ahmad Shah prohibited cow slaughter. Nawab Hyder Ali of Mysore made cow slaughter an offence punishable with the cutting of the hands of the offenders. *Id.*, at 740.

cows. The Court, therefore, concluded :

> "We have, however, no material on the record before us which will enable us to say, in the face of the foregoing facts, that the sacrifice of a cow on that day is an obligatory overt act for a Mussalman to exhibit his religious belief and idea."[19]

The problems which arise in case of profession of religion are being discussed separately.

(1) Religious Worship and Processions on Highways and in Public Parks:

One of the methods of demonstrating that a person professes a particular religion is public worship and taking out religious processions on public roads and public parks. As early as in 1882 a pronouncement was made by the Madras High Court in *Parthasaradi Ayyangar v. Chinnakrishna Ayyangar*,[20] where Turner, C.J., laid down the following rule :

> "(P)ersons of whatever sect are at liberty ... to conduct religious processions through public streets so that they do not interfere with the ordinary use of such streets by the public and subject to such directions as the magistrates may lawfully give to prevent obstructions of the thoroughfare or breaches of the public peace."[21]

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19. *Ibid.*

20. 5 Mad 304 (1882).

21. *Id.*, at 309.

In another case, Empress v. Tucker,[22] an assembly of 50 to 60 persons of the so-called Salvationists was declared unlawful by the magistrate merely because of an apprehension of public disorder. The Bombay High Court held the action of the magistrate valid on the ground that where there was an apprehension of public disorder, the "opinions of policemen who know the people ... is obviously valuable"[23] and the magistrate having looked at the surrounding circumstances could declare an assembly unlawful. The Court referred to the following facts in upholding the order of the magistrate :

> "(The) different classes (of people) who live in Bombay, their feelings and the inflammable material of which the population is made up, and knowing the views of the so-called Salvationists who style themselves an army whose avowed purpose is, as it were, to force their views upon others, it appears to us that most people of common sense would come to the conclusion that an assembly such as that we are considering, in public streets would probably lead to a disturbance."[24-25]

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22. 7 Bom 42 (1882).

23. Id., at 50.

24. Ibid.

25. In the United States the police is not allowed to take such preventive measures merely on the probability of a breach of public peace. See infra pp. 246-51.

In two cases decided in 1909 the Madras High Court[26] took the same view that public streets were open to persons of all sects and creeds. In both these cases one section of the Hindus wanted to bring a religious procession while the other section disputed their right. The Court held that every one was entitled to carry a religious procession along the public streets but no particular sect could claim, on grounds of custom or immemorial usage, an exclusive right to carry processions through such streets. The Court emphasised that the exercise of the right to carry processions should not interfere with the ordinary use of the roads by the general public. The Court also pointed out that a magistrate had power to regulate the religious processions on public roads in order to prevent obstruction of thoroughfares and to avoid breaches of public peace.

The question of the right to take out procession on public roads came up before the Privy Council in 1925 in Saiyid Mansur Hassan v. Saiyid Muhammad Zaman.[27] In that

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26. Kandaswamy v. Subraya, 32 Mad 478 (1909) and Mannada v. Nallaya, 32 Mad 527 (1909).

27. AIR 1925 PC 36.

case, there was a dispute between the two sects of Muslims, Shias and Sunnis, as to the right of taking out processions on highways. Both the sects worship in the month of Moharram in a different manner. The Shias carry various religious emblems while they march in the procession. They stop from time to time and perform a ceremony called matam. Sunnis perform their worship in a mosque and do not take out the procession or perform the ceremony of matam. On the contrary they object to the performance of matam. In this case Sunnis got a prohibitory order from the magistrate that when the procession of the Shias would pass by the side of a certain mosque they were not to perform matam on the ground that the shia procession disturbed their prayers in the mosque. Therefore the Shias instituted a suit for a declaration that they had the right to take out the procession and to perform matam. The District Judge granted the declaration but the High Court set aside the decision. When ultimately the case went on appeal to the Privy Council it was held that every one had a liberty to carry a religious procession through a public street provided it did not interfere with the ordinary use of such streets by the public. The magistrate could issue directions in order to prevent the breach of public peace. As there was an apprehension of

disorder, the magistrate had the power to prohibit the processionists from performing matam within a certain distance from the mosque. The Privy Council further held that the local authorities were competent to pass orders for regulating the traffic and in doing that they could control the movement of even religious processions.

The Indian Supreme Court, later affirmed the view of the Privy Council. In the unreported case of Piru Bux v. Kalandi Pati Rao,[28] reiterating the view adopted by the Privy Council, the Supreme Court held that the right to take out a procession was not unrestricted but subject to the order of the police made for regulating the traffic, or directions issued by a magistrate in the interests of public order.

In Martin & Co. v. Syed Faiyaz Husain,[29] an electric company was granted a licence to instal electric wires at a height of 20 feet on the highways. Shia Muslims claimed a customary right to carry tazias reaching 27 feet above the ground on the occasion of Moharram. The Division Bench of

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28. Piru Bux v. Kalandi Pati Rao, Civil Appeal no.25 of 1966, decided Oct. 29, 1968 by the Supreme Court of India.

29. AIR 1944 PC 33.

the Allahabad High Court[30] interpreting the earlier Privy Council case of *Saiyid Manzur Hasan v. Saiyid Muhammad Zaman*[31] as guaranteeing freedom to take out religious procession without any obstruction decreed the suit. The Privy Council, however, set aside the decision of the High Court. It held that the rights of the plaintiffs were equal to those of any other member of the public. Such rights might be lawfully abridged. Once the municipality granted a licence to the electric company to instal wires at a height of 20 feet, it must be taken that the right of the public to that extent was curtailed.

Under the Indian Constitution, the right of citizens to take out processions or to hold public meetings flows from article 19. This article guarantees that all citizens shall have the right to assemble peaceably and without arms and to move freely throughout the territory of India.[32] In the case of religious procession or a religious meeting the right is further buttressed by

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30. *Faiyaz Husain v. Municipal Board, Amroha*, AIR 1939 All 230.

31. AIR 1925 PC 36.

32. *Babulal Parate v. The State of Maharashtra*, AIR 1961 SC 884, 891.

article 25(1) which guarantees the right to practise, profess and propagate one's religion. Such rights are, however, subject to reasonable restrictions in the interests of public order and morality. Section 30 of the Police Act[33] gives wide powers to the police. They are authorised to regulate assemblies and processions, and prescribe the routes and timings for such processions.[34] Where there is a likelihood of breach of peace, they may require persons organising such assemblies and processions to obtain a licence.[35] No fee can be charged either on the application or for the grant of any such licence.[36] In Sitaram Das v. Emperor,[37] the matter concerned the police control of processions. The Patna High Court was of the opinion that the police authorities had no power to

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33. Act 5 of 1861.

34. Section 30(1).

35. See Aghore Chandra Deb Barma v. The State, AIR 1964 Tripura 52. The notification issued by the authorities was held valid which required 3 days notice prior to the taking out of a procession.

36. Section 30(3), the Police Act, 1861.

37. AIR 1926 Pat 173.

disallow the taking out of a procession but they could ask for a licence to be taken so that they might be able to make adequate arrangements to control the traffic and to avoid congestion. The same view was taken in a subsequent case by the Allahabad High Court. In *Qasim Raza v. Emperor*,[38] the Court held that it was the right of a citizen to use the public thoroughfares, provided he did not commit any offence in doing so. The Court took the view that section 30 of the police Act empowered the authorities to control processions, but it conferred no absolute discretion to refuse permission.[39] It was further held that even if a person made a promise to the Police Superintendent that he would not take out a procession and yet took it out, it would not be treated as a disobedience of orders so as to expose the person to any penalty since the police were not authorised to forbid the taking out of a procession in those circumstances. The Court noted :

> "It is the right of a citizen to use the public thoroughfares, provided that he commits no offence in doing so, and the taking out of a procession is not in itself an offence, ... Neither in the marginal note, nor in the body of the section, (Sec.30 Police Act), is any express power given to the authorities absolutely to forbid the taking out of a procession."[40]

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38. AIR 1935 All 657 (DB).

39. The two Patna and Allahabad cases were relied on in the subsequent cases. See, e.g. *Ramkhelawan Poddar v. The King* AIR 1951 Pat 418; *Saraibala Dewan v. The State*, AIR 1962 Pat 244.

40. *Qasim Raza v. Emperor*, AIR 1935 All 657, at 659.

Section 30(4) of the Police Act also authorises the police authorities to regulate the playing of music on the public streets. In a Madras case,[41] the magistrate prohibited the playing of music while the procession passed by the side of a mosque. The Madras High Court held that such an order was invalid. It was conceded that if a procession was carried by the side of the place where religious worship was being held by persons belonging to a different denomination, a magisterial order requiring stoppage of music for the time being might not be invalid. In substance the Court held that a general order prohibiting the playing of music whenever any procession passed a particular place could not be supported. The rationale of the Court's view is to reconcile the conflicting claims of the followers of different religions with a view to prevent a breach of peace.[42]

As stated above,[43] since the adoption of the Indian Constitution the right to conduct religious processions

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41. Muthialu Chetti v. Bapun Saib, 2 Mad 140 (1880).

42. Cf. the statement of Jackson, J., in Sarah Prince v. Commonwealth of Massachusetts (321 US 158, 176,1944): "I think the limits begin to operate whenever activities begin to affect or collide with liberties of others or of the public."

43. Supra p.238-9.

forms part of the right to profess one's own religion. The police authorities have, however, the power to regulate the taking out of processions in the interests of public order, morality, health and safety. The position, therefore, is that the old provisions contained in the Police Act and the Penal Code relating to processions are valid under the Constitution. In several recent cases the courts have followed the law laid down in pre-Constitution cases. In a Madras case of 1954[44] the question of holding assemblies and taking out processions was incidentally raised and the High Court citing earlier cases held that under section 30 of the Police Act the authorities have the power to ask for licences if they apprehend a breach of peace on any particular occasion.

In a recent case, Babulal Parate v. The State of Maharashtra,[45] the matter came up before the Supreme Court. In that case the District Magistrate had promulgated an order under section 144 of the Code of Criminal Procedure prohibiting the taking out of processions except funeral or religious ones. Section 144 of the Code was impugned

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44. Public Prosecutor v. K.G. Sivaswamy, AIR 1954 Mad 249.

45. AIR 1961 SC 884.

as ultravires article 19(1)(a) and (b) of the Constitution. Mudholker, J., delivering the judgment of the Court, ruled that though such preventive measure was not permissible in the United States, it was constitutional in India. As to the argument that the test of determining criminality in advance was unreasonable, he remarked that the contention was apparently based on the opinion expressed by the American Supreme Court in Charles T. Schenck v. United States of America,[46] that previous restraints on the exercise of fundamental rights were permissible only if there was a "clear and present danger." But he said that there was a difference between the provisions of the Constitution of India and the United States and "the American doctrine cannot be imported under our Constitution."[47] Referring to the fundamental rights guaranteed in article 19(1), he said that while they were subject to the restrictions placed in the subsequent clauses of article 19, there was nothing in the American Constitution corresponding to clauses (2) to (6) of article 19 of our Constitution. As to section 144

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46. 249 US 47 (1919).

47. Babulal Parate v. State of Maharashtra, AIR 1961 SC 884, at 890.

of the Code of Criminal Procedure, he said that the test laid down in the section was not merely a "likelihood" or a "tendency" of the breach of peace, but the power conferred by the section was exercisable also when there was an apprehension of danger.[48] Mudholkar, J., said:

> "Public order has to be maintained in advance in order to ensure it and, therefore it is competent to a legislature to pass a law permitting an appropriate authority to take anticipatory action or place anticipatory restrictions upon particular kinds of acts in an emergency for the purpose of maintaining public order."[49]

In this case the police authorities apprehending trouble from the activities of the two unions of certain workers issued an order that no assemblies and processions were to be held without a licence for a period of one year. The Court on these facts held that as the police authorities had not properly applied their minds while issuing the order, it could not be upheld.

In an Allahabad case,[50] where the licence to take out a procession was refused, the High Court arrived at a different conclusion. The applicants had applied for

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48. Ibid.

49. Id., at 891.

50. Mohammad Siddiqui v. State of U.P., 1954 AIR All 786.

permission to take out a procession at the time and the route fixed by the police. The authorities flatly refused the permission. The applicants petitioned the Court which upheld the refusal of the police authorities. Though the Court made a reference to the Privy Council case of Mansur Hasan,[51] where it was laid down that every one had a right to conduct religious processions subject to the lawful directions of the magistrate, it is submitted that the High Court did not give full weight to the provisions of the Police Act . As noted above, section 30 does not empower the authorities to forbid the taking out of a procession outright.[52] It simply authorises them to regulate a procession and at the most to ask for taking out a licence from the police authorities.

In the United States the constitutional protection in respect of public expression has been given a wide latitude. A person may in certain circumstances enter on private premises for the purpose of making religious exhortations.[53] However, the government has power to require the taking of licences and permits to hold public

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51. Saiyid Mansur Hasan v. Saiyid Muhammad Zaman, AIR 1925 PC 36.

52. Sitaram Das v. Emperor, AIR 1926 Pat 173, Qasim Raza v. Emperor, AIR 1933 All 657.

53. Grace Marsh v. State of Alabama, 326 US 501 (1946). See infra pp.359-60

worship, which are usually granted as a matter of course, though restrictions may be imposed in the interest of public order. The licensing authority might refuse to grant a licence if the applicant is not ready to abide by the regulations prescribing time and place for holding the meeting. The refusal should not, however, be capricious and irrational. In cases where the empowering statute confers untrammelled discretion on the authorities in the matter of issuing of licence such a statute might be found unconstitutional. This conclusion is supported by Danial Niemotko v. State of Maryland[54] and Carl Jacob Kunz v. People of the State of New York,[55] decided by the United States Supreme Court. In the former case, the appellants, who were members of Jehovah's Witnesses, wanted to give Bible talks in a public park in the city of Havre de Grace in the state of Maryland. In accordance with the practice prevailing in that city the appellants applied for a permit to the Park Commissioner four times for consecutive Sundays in June and July 1949. The permission was refused every

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54. 340 US 268 (1951).

55. 340 US 290 (1951).

time. The appeal to the City Council against the refusal was also, after hearing, rejected. The reasons for such refusals were neither recorded nor communicated to the appellants. In spite of the refusal of the authorities to give permission, the appellants organised the meeting in the park. The moment they began the teaching of the Bible, they were arrested. Later on, they were fined by the local Court on the charge of disorderly conduct. The Maryland's Court of Appeals declined to interfere and confirmed the sentence. The United States Supreme Court, on appeal, reversed the judgment and held that the appellants had the right to hold religious worship in the public park. The Court was critical of the manner in which the Park Commissioner and the City Council had refused to grant the licence without recording any reasons for the same. In the opinion of the Court licensing statutes and ordinances "in the absence of narrowly drawn, reasonable and definite standards for the officials to follow, must be (deemed) invalid."[56] In the instant case it was merely a "practice" which could not be upheld as it did not provide for any standard to guide the exercise of discretion. In the words

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56. Daniel Niemotko v. State of Maryland, 340 US 268, 271 (1951).

of the Court :

"No standards appear anywhere; no narrowly drawn limitations; no circumscribing of this absolute power; no substantial interest of the community to be served... (T)he lack of standard in the license-issuing "practice" renders that "practice" a prior restraint in contravention of the Fourteenth Amendment, and that the completely arbitrary and discriminatory refusal to grant the permits was a denial of equal protection."[57]

In the latter case, Carl Jacob Kunz v. People of the State of New York,[58] the appellant, who was a Baptist minister, was convicted for holding a religious meeting without a permit. The City of New York had adopted an ordinance under which it was unlawful to hold public worship meetings on the streets without first obtaining a permit from the city Police Commissioner.[59] The permit obtained by the appellant for the year 1946 to preach on public highways was later on revoked on the ground that he had "ridiculed and denounced other religious beliefs in his meeting." In 1947, and again in 1948 he applied for permits but they were "disapproved" without assigning any reason. The appellant was arrested in September 1948 for speaking without obtaining a permit. The United States Supreme Court

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57. Id., at 272-3.

58. 340 US 290 (1951).

59. The relevant part of the said ordinance read : "It shall be unlawful for any person to be concerned or instrumental in collecting or promoting any assemblage of persons for public worship or exhortation, ... (without) a permit therefor which may be granted and issued by the police Commissioner." Id., at 291, fn.1.

by an 8 to 1 decision held that the New York statute violated the First Amendment in so far as it authorised the Police Commissioner to revoke or refuse a permit at his unfettered discretion. Vinson, C.J., who delivered the majority opinion, relying on Frank Hague v. Committee for Industrial Organization,[60] held that streets and parks had since time immemorial, been used for "communicating thoughts between citizens."[61] He also cited Jesse Cantwell v. State of Connecticut[62] for the proposition that the licensing system, which gave to an administrative official discretion unrelated to the proper regulation of public places was unconstitutional.[63]

It is beyond dispute that if regulations exist to control processions and public meetings in order to maintain public peace and to ensure orderly conduct of processions passing through the same route or being held at the same place, they are unobjectionable. If different communities holding divergent and antagonistic views are permitted to use the same street or park without any restraint there is

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60. 307 US 496 (1939).

61. Id., at 515. Cited by Vinson, C.J., in Carl Jacob Kunz v. People of the State of New York, 340 US 290,293.

62. 310 US 296, 308 (1940).

63. Jackson, J., in his dissent pointed out that the appellant was free to make his speech on a private property. But as he wanted to speak on a public property the public authorities had discretion to refuse or grant the same. Carl Jacob Kunz v. People of the State of New York, 340 US 290, 298.

a likelihood of breach of the peace. The authorities may not be concerned with the objectives of persons organising meetings or processions but they are certainly concerned to ensure smooth running of the traffic along the route on which the procession passes. The rules made to ensure this would normally be upheld.

It is unnecessary to cite authorities on these points. But one may, by way of example, refer Willis Cox v. State of New Hampshire,[64] where a large number of Jehovah's Witnesses were convicted for violating a state statute which required a permit to hold a procession on a public street.[65] The United States Supreme Court approved the view of the state Supreme Court that the conditions in the licence served "to prevent confusion by overlapping parades or processions, to secure convenient use of the streets by other travellers, and to minimise the risk of disorder."[66] The Court said that the civil liberty implied the existence of an organised society and for the use of such liberty it was necessary that the city authorities should see that there was no overlapping of the time and place. Hughes, C.J., delivering the unanimous opinion of the Court said :

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64. 312 US 569 (1941).
65. Public Law of New Hampshire, chap. 145 s.2. Ibid.
66. Willis Cox v. State of New Hampshire, 312 US 569, 576.

"The authority of a municipality to impose regulations in order to ensure the safety and convenience of the people in the use of public highways has never been regarded as inconsistent with civil liberties but rather as one of the means of safeguarding the good order upon which they ultimately depend."[67]

It is worth noting that the Jehovah's Witnesses were not prosecuted for their views which were alleged to be defamatory and scurrilous.[68] But in _Carl Jacob Kunz v. People of the State of New York_ discussed above,[69] the permit was refused, not just to control the overlapping of time and place but to prevent ridiculing and denouncing of other religious beliefs. In _Frank Hague v. Committee for Industrial Organization_,[70] decided in 1939, the Supreme Court struck down a statute which authorised the refusal of permit in order to prevent "riots, disturbances or disorderly assemblage."[71] These conflicting cases cannot be easily reconciled. But it seems that the holding of the meeting cannot be prevented in advance on the ground of possibility of disturbance. It is the duty of the authorities to make elaborate police arrangements and take other precautions for the purpose of maintaining law and order. Unless

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67. _Id._, at 574.

68. Some of the remarks printed on the signboards alleged to be scurrilous were "Religion is a Snare and a Racket." "Fascism or Freedom. Hear Judge Rutherford and Face the Facts."
_Id._, at 572.

69. 340 US 290 (1951), _supra_ p. 248.

70. 307 US 496 (1939).

71. _Id._, at 501 fn. 1.

rioting or disturbance either actually takes place or becomes so imminent that it cannot be avoided, the authorities should not it is argued ban the holding of the meeting.[72]

(ii) Profession of Religion and Temple Entry.

Both in India and the United States, there are religious institutions which are run by religious denominations. The state does not usually interfere with them except in rare circumstances and that too just to ensure that the persons in control of these institutions do not misuse their authority. The major question raised by these institutions is that they have by and large restricted admission to these institutions on various grounds. In such a case the state may be compelled to interfere in the interest of those who are denied admission and are thereby discriminated. This problem exists both in India and the United States. Until recently, in India the low-caste Hindus, called the untouchables, were not allowed to enter into Hindu temples. So also in the United States there are separate churches for the whites and the negroes and the latter are not welcome in the churches of the former.

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72. "A statute that enables the community to refuse to allow the meeting, merely because it is simpler and more economical to ban the meeting than to provide the necessary policing, would be unconstitutional." Pfeffer, Leo, Church, State, and Freedom (1953, Beacon Press, Boston), 557.

In India the problem has been attempted to be solved by the Constitution itself. Article 25(2)(b)[73] provides that the state is empowered to make a law to throw open "Hindu religious institutions of a public character to all classes and sections of Hindus."[74] Article 17 specifically forbids untouchability. Even prior to the adoption of the Constitution statutory reforms were carried out in many provinces[75] and in some

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73. Article 25(2)(b) says :
"Nothing in this article shall affect the operation of any existing law or prevent the State from making any law - ... providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus.
"Explanation II. - In sub-clause(b) of clause 2, the reference to Hindus shall be construed as including a reference to persons professing the Sikh, Jaina for Buddhist religion, and the reference to Hindu religious institutions shall be construed accordingly."

74. Discussed at pp. 471-7 *infra*.

75. The Bihar Harijan (Removal of Civil Disabilities)Act, 1949 (Bihar Act 19 of 1949); the Bombay Harijan (Removal of Social Disabilities)Act, 1946 (Bombay Act 10 of 1947), the Bombay Harijan Temple Entry Act,1947 (Bombay Act 35 of 1947), the Central Provinces and Berar Scheduled Castes (Removal of Civil Disabilities) Act, 1947 (C.P. & B. Act 24 of 1947); the Central Provinces and Berar Temple Entry Authorisation Act,1947 (C.P. & B. Act 41 of 1947); the East Punjab (Removal of Religious and Social Disabilities)Act, 1948 (East Punjab Act 16 of 1948); the Madras Removal of Civil Disabilities Act, 1938 (Madras Act 21 of 1938); the Orissa Removal of Civil Disabilities Act, 1946 (Orissa Act 11 of 1946); the Orissa Temple Entry Authorisation Act, 1948 (Orissa Act 11 of 1948); the United Provinces Removal of Social Disabilities Act, 1947 (U.P. Act 14 of 1947); and the West Bengal Hindu Social Disabilities Removal Act, 1948 (West Bengal Act 37 of 1948).

princely states.[76-77] The Indian Parliament in order to carry out the constitutional provisions enacted the Untouchability (Offences) Act[78] which makes it an offense to prevent any person from entering places of public worship on grounds of untouchability.[79-80] In some cases courts could not give effect to

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76. The Hyderabad Harijan (Removal of Social Disabilities) Regulation, 1358F (No.56 of 1358 Fasli); the Madhya Bharat Harijan Ayogta Nivaran Vidhan, Samvat 2005(Madhya Bharat Act No.15 of 1949); the Removal of Civil Disabilities Act, 1943 (Mysore Act 42 of 1943); the Mysore Temple Entry Authorisation Act, 1948 (Mysore Act 14 of 1948); the Saurashtra Harijan (Removal of Social Disabilities) Ordinance (No.40 of 1948); the Travancore-Cochin Removal of Social Disabilities Act, 1125 F (Travancore Cochin Act 8 of 1125), the Travancore Cochin Temple Entry (Removal of Disabilities) Act, 1950 (Travancore Cochin Act 27 of 1950); the Coorg Scheduled Castes (Removal of Civil and Social Disabilities) Act, 1949 (Coorg Act 1 of 1949), and the Coorg Temple Entry Authorisation Act, 1949 (Coorg Act 2 of 1949).

77. All these enactments followed the general lines of the Madras Removal of Civil Disabilities Act, 1938(Mad. Act 21 of 1938) with minor variations. They made it a criminal offence to enforce disabilities against untouchables.

78. Act 22 of 1955.

79. "Whoever on the ground of untouchability prevents any person:
   (i) from entering any place of public worship which is open to other persons professing the <u>same religion</u> or belonging to the <u>same religious denomination or any section thereof</u>, as such person; or
   (ii) from worshipping or offering prayers or performing any religious service in any place of public worship, ... in the same manner and to the same extent as is permissible to other persons professing the <u>same religion</u> or belonging to the <u>same religious denomination or any section thereof</u>, as such persons; shall be punishable with imprisonment which may extend to six months, or with fine which may extend to five hundred rupees or with both."(Emphasis added). Section 3, the Untouchability(Offences) Act, 1955.

the provisions of the Act as it was limited to persons professing the same religion or persons belonging to the same religious denomination. Thus, it has been held that a low-caste Hindu cannot claim entry into a Jain temple for the reason that firstly, he is not a Jain; and secondly, even non-Jain caste Hindus have no right of entry into such a temple.[81]

A Madhya Pradesh case[82] exemplifies the point. There the authorities for the purpose of enabling Hindus to visit a Jain temple installed a Hindu idol in it. They prohibited the Jains from entering and worshipping in the temple except on condition that they allowed the Hindus to worship the newly installed idol. The Madhya Pradesh High Court rejected the claim of the state that it could interfere in the manner in which it did and held that the installation of a Hindu

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80. Some states have also enacted laws declaring and assuring to every member of a depressed class the right to enter into every Hindu temple and offer and participate in worship in the same manner and to the same extent as Hindus in general or any section thereof. See e.g., The Uttar Pradesh Temple Entry (Declaration of Right) Act, 1956 (U.P. Act No.33 of 1956).

81. State v. Puranchand, AIR 1958 MP 352. See also Bhaichand Tarachand v. State of Bombay, AIR 1952 Bom 233, a case on the Bombay Harijan Temple Entry Act, 1947 (Bombay Act 35 of 1947).

82. Tejraj Chhogalal Gandhi v. State of Madhya Bharat, AIR 1958 MP 118.

idol in a Jain temple was deplorable. The state had power and was actually under a duty to take appropriate action to maintain public order, but the interference in the circumstances of the case could not be justified. In another case, the practice whereby the untouchables were prevented like other ordinary members of the community from entering into the 'Nalambalam' of a temple belonging to the Gowda Saraswath Brahmin community was not held obnoxious.[83] In Swami Hariharnand Saraswati v. The Jailor in Charge District Jail Banaras,[84] the famous Vishwanath temple case, the constitutionality of the Uttar Pradesh Removal of Social Disabilities Act[85] was challenged. The Act provides that a person cannot prevent another from having access to any public temple or enjoying the advantages, facilities and privileges of any such temple to the extent to which the same are available to other Hindus.[86] The Vishwanath temple was open to high caste Hindus only. The low-caste

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83. State of Kerala v. Venkitaswara Prabhu, AIR 1961 Ker 55. The same rule was applied in other temple entry cases, e.g., Nar Hari Shastri v. Shri Badrinath Temple Committee, AIR 1952 SC 245, Bali Mahapatra v. Indian Dominion, AIR 1951 Orissa 146, Swami Hariharanand Saraswati v. The Jailor in Charge District Jail Banaras, AIR 1954 All 601.

84. AIR 1954 All 601.

85. U.P. Act 14 of 1947.

86. Id., S. 3(d).

Hindus or the so-called Harijans were not permitted by the temple priests to enter into the main temple. The persons of the excluded class could have *darshan* of the holy image through an aperture having its approach by an outer passage adjacent to and separate from the main sanctuary. When, however, they insisted upon their entry, the temple authorities raised objections and protests. They contended that the enabling Act was unconstitutional. The Division Bench of the Allahabad High Court rejected this contention and upheld the validity of the enactment on the basis of certain previous decisions of different courts.[87]

The question of temple entry arose before the Supreme Court in *Sri Venkataraman Devaru v. State of Mysore*.[88] In that case Gowda Saraswath Brahmins of a particular village claimed a right to exclude Hindus of a lower social strata from the temple of their denomination. The Madras Act[89] had provided for the right of "persons belonging to the excluded classes" to enter "any Hindu

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87. *Manikkasundara Bhattar v. R.S. Nayudu*, AIR 1947 FC 1., *Kalidas Anthavam v. Emperor*, AIR 1949 Bom 169, and *State v. Gulab Singh*, AIR 1953 All 483.

88. AIR 1958 SC 255.

89. The Madras Temple Entry Authorisation Act, (Madras Act 5 of 1947) as amended by Act 13 of 1949.

temple and offer worship therein in the same manner and to the same extent as Hindus in general."[90] Though the Supreme Court admitted that the temple in which the excluded class claimed admission was a denominational temple meant only for Gowda Saraswath Brahmins, it held that the scope of article 25(2)(b) was wide enough to include denominational institutions. Venkatarama Aiyar, J., delivering the opinion of the Court declared:

> "(P)ublic institutions would mean not merely temples dedicated to the public as a whole but also those founded for the benefit of sections thereof, and denominational temples would be comprised therein."[91]

It may, however, be noted that there is a vital difference between this case and the Jain temple cases referred to above. In this case the temple was generally open to all high caste Hindus whether they belonged to the Gowda Saraswath Brahmin community or not, but in the Jain temple cases the claimants did not belong to the Jain community.

Recently the question came up again before the Supreme Court in Shastri Yagnapurushdasji v. Muldas Bhundardas Vaishya,[92] the so called Satsangi case. The Bombay Act[93]

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90. Sri Venkataramana Devaru v. State of Mysore, AIR 1958 SC 255, 260.

91. Id., at 267.

92. AIR 1966 SC 1119.

93. The Bombay Hindu Places of Public Worship (Entry Authorisation) Act 1956, (Bombay Act 31 of 1956).

provided for the opening of Hindu places of worship to all sections and classes of Hindus. It was contended by the appellants, who belonged to the Swaminarayan sect, known as the Satsangi sect, that they formed a sect of their own which was entirely separate and distinct from the Hindu community. As such the untouchables or even non-Satsangis could claim entry into such temples unless they were made Satsangis by initiation. But the Supreme Court rejected the plea and held that the Satsangis were Hindus and they could not exclude the low-caste Hindus even if they did not become Satsangis by initiation. Gajendragadkar, C.J., who delivered the judgment of the Court, said that the main object of the temple entry legislation was "to establish complete social equality between all sections of the Hindus in the matter of worship..."[94] Dealing with the contention that Satsangis were not Hindus, he traced the history and nature of Hinduism. After referring the authorities, like Monier Williams,[95] Dr. Radha Krishnan,[96] and Max Muller[97] he came to the conclusion that the usual test applied to any

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94. Shastri Yagnapurushdasji v. Muldas Bhundardas Vaishya, AIR 1966 SC 1119, 1127.

95. Monier Williams, Religious Thought and Life in India (1883), Hinduism. Referred to Id., at 1128-9.

96. Radhakrishnan, The Hindu View of Life, Indian Philosophy, Vol.I., Ibid.

97. Max Muller, Six Systems of Indian Philosophy. Id., at 1130.

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95. Williams, Monier, Religious Thought and Life in India (1883), Hinduism. Referred to ibid, at 1128-9.

96. Radhakrishnan, Dr., The Hindu View of Life, Indian Philosophy, Vol. I., ibid.

97. Max Muller, Six Systems of Indian Philosophy, ibid, at 1130.

recognised religion was inadequate in dealing with the nature of Hindu religion. Normally any recognised religion or religious creed subscribes to a body of set philosophic concepts and theological beliefs. But in his view it was doubtful whether this criteria could be applied to the Hindu religion.[98] Realising the difficulties of putting Hinduism within any set of philosophic concept, he quoted with approval its essential features as given by Bal Gangadhar Tilak:

"Acceptance of the Vedas with reverence; recognition of the fact that the means or ways to salvation are diverse; and realisation of the truth that the number of gods to be worshipped is large, that indeed is the distinguishing feature of Hindu religion."[99]

Tracing the evolution of the Satsangi sect and its main principles, he found that it is primarily based on the philosophy of Visishtadvaitavada propounded by Ramanujacharya, according to which,

"every individual should follow the main Vedic injunctions of a good, pious and religious life and should attempt to attain salvation by the path of devotion to Lord Krishna."[100]

Even the 'Mantra' which is given to a person at the time of initiation, merely says :

"Lord Krishna, thou art my refuge, Lord Krishna, I dedicate myself to thee."[101]

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98. Id., at 1129.
99. Quoted from Tilak, Bal Gangadhar, Gitarahasaya. Id., at 1131.
100. Id., at 1134.
101. Id., at 1134.

The Chief Justice found that though the Satsangis could be regarded as social reformers, but they were not out of the Hindu fold. Summing up he said :

> "In conclusion, we would like to emphasise that the right to enter temples which has been vouchsafed to the Harijans by the impugned Act in substance symbolises the right of Harijans to enjoy all social amenities and rights for, let it always be remembered that social justice is the main foundation of the democratic way of life enshrined in the provisions of the Indian Constitution."[102]

In Nar Hari Shastri v. Shri Badrinath Temple Committee,[103] another type of question concerning temple entry arose before the Supreme Court. In that case certain Pandas used to escort pilgrims to Shri Badrinath temple and in return they got some remuneration from the pilgrims whom they escorted and helped in 'darshan' and worship. Shri Badrinath temple management committee, constituted under a state Act,[104] put restrictions on the entry of these Pandas into the temple when accompanied with the pilgrims. The Committee justified it on the ground that it had made adequate arrangement for darshan and worship and therefore the services of Pandas were not necessary. The Committee

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102. *Id.*, at 1138.

103. AIR 1952 SC 245.

104. Shri Badrinath Temple Act, 1939 (U.P. Act 16 of 1939).

also laid down that the donations given to pandas within the precincts of the temple should be appropriated under the Act as a donation to the temple. Mukerjee, J., who delivered the judgment of the Court, traced the history of the practice of the Pandas associated with most of the temples of pilgrimage. In his opinion Pandas had, as a member of the Hindu community, an equal right to enter the temple as any other person of the community had. He could not claim a right to enter into the sacred parts of the temple, e.g., the inner sanctuary or the 'Holy of Holies' where the deity was installed. The reason for such restriction was, as mentioned in the judgment, that actual service to the deity was performed by the shebait or by a person specially designated for the purpose, and that the Hindus in general were not allowed to enter into that part. Similarly the Pandas could not be allowed to have any preferential treatment. But in the part of the temple where the Hindu public was allowed to enter and to have darshan of the deity, the entry of the Pandas could also not be restricted, whether they went alone for darshan and worship, or they escorted the pilgrims to the temple for darshan and worship. Mukerjee, J., declared :

> "As the Panda as well as his client are both Hindu worshippers, there can be nothing wrong in the one's accompanying the other inside the Temple.... In law,

> it makes no difference whether one performs the act of worship himself or is aided or guided by another in the performance of them."[105]

The Court also held that a donation which a Panda received whether inside or outside of the temple was a kind of private donation and could not belong to the temple merely because such a donation was made within the temple precincts.

The aforesaid discussion shows that the persons belonging to a particular religion, whether untouchables or not have been given the same rights as are enjoyed by others in respect of temple entry. In this respect there cannot be any discrimination against any individual on the ground that one is a caste Hindu and the other is not.[106] But if there is any convention in any temple that the act of actual worship of the deity, as different from its darshan, is to be performed only by designated

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105. Nar Hari Shastri v. Shri Badrinath Temple Committee, AIR 1952 SC 245, 250.

106. Marc Galanter, Temple Entry and the Untouchability (offences) Act, 1955, 6 JILI 185 (1964).

priests, they can alone go near the deity to the exclusion of others whether of high caste or of low caste.[107]

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107. Har Hari Shastri v. Shri Badrinath Temple Committee, AIR 1952 SC 245, State of Kerala v. Venkitaswara Prabhu, AIR 1961 Ker 55.

Chapter VIII

Practice of Religion

The practice of religion is the external manifestation of religious belief. It seems that article 25 grants as much freedom to religious practice as it does to religious belief and profession. In some earlier cases some of the state courts in India expressed the view that state protects religious belief but not religious practices. In The State of Bombay v. Narasu Appa Mali,[1] Chagla, C.J., had said that "a sharp distinction must be drawn between religious faith and belief and religious practices. What the state protects is religious faith and belief."[2] In the view of the Court if religious practices run counter to public order or to a policy of social welfare upon which the state has embarked, then the religious practices must give way to the good of the people of the state as a whole. This view was actually based on the authority of the American case, Samuel D. Davis v. H.G. Benson.[3] In Narasu Appa case[4] the Court said that though the freedom to believe was absolute, the freedom to manifest the belief by overt acts was not so.

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1. AIR 1952 Bom 84.
2. Id., at 86.
3. 133 US 333 (1890).
4. The State of Bombay v. Narasu Appa Mali, AIR 1952 Bom 84.

The question of the freedom of religious practice was elaborately discussed by the Supreme Court in Commissioner Hindu Religious Endowments, Madras v. Sri Lakshmindra Tirtha Swamiar of Sri Shirur Mutt.[5] In this case the Supreme Court held void a provision of the Madras Hindu Religious and Charitable Endowments Act, 1951, empowering the Commissioner of Endowment and his subordinates to enter religious institutions and places of worship. The question arose whether the Act constituted an interference with the management of religious institutions and with the rites and ceremonies, and religious practices. Though the case was directly concerned with the rights of the head of a religious institution under article 26(b)[6] as to the management of the affairs of religious denomination in matters of religion, it was suggested that the practice of religion in article 25(1) and matters of religion in article 26(b) have the same scope. Mukerjea, J., delivering the unanimous opinion of the Court, observed that the Constitution gave protection not only to religious belief but also

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5. AIR 1954 SC 282.

6. "Subject to public order, morality and health, every religious denomination or any section thereof shall have the right ... to manage its own affairs in matters of religion, ..."
Article 26(b), Constitution of India.

to religious practices. According to him :

> "The guarantee under our Constitution not only protects the freedom of religious opinion but it protects also acts done in pursuance of a religion and this is made clear by the use of the expression "practice of religion" in Art. 25."[7]

He cited, in his support, the views of Latham, C.J., of the High Court of Australia to the effect that the religious freedom[8] protects not only the liberty of opinion but also acts done in pursuance thereof. Mukerjea, J., quoted with approval the following passage from the judgment of Latham, C.J. :

> "It is sometimes suggested in discussions on the subject of freedom of religion that, though the civil Government should not interfere with religious opinions it nevertheless may deal as it pleases with any 'acts' which are done in pursuance of religious belief without infringing the principles of freedom of religion. It appears to me to be difficult to maintain this distinction as relevant to the interpretation of s.116. The Section refers to in express terms to the 'exercise' of religion, and therefore it is intended to protect from the operation of any commonwealth laws acts which are done in the exercise of religion. Thus the section goes far beyond protecting liberty of opinion. It protects also acts done in pursuance of religious belief as part of religion."[9]

While defining the term 'religion' Mukerjea, J., rejecting

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7. Commissioner Hindu Religious Endowments, Madras v. Sri Lakshmindra Tirtha Swamiar of Sri Shirur Mutt, AIR 1954 SC 282, 290.

8. The Australian Constitution says :
"The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as qualification for any office or public trust under the Commonwealth."
The Commonwealth of Australia Constitution Act 1900 (63 and 64 Vict.c.12 s.116).

as imprecise and inadequate the definition given in Samuel D.Davis v. H.G. Beason[10] held that the term religion had its basis not only in a system of belief but also in the "rituals and observances, ceremonies and modes of worship which (are) regarded as integral parts of religion."[11] He stated that the religious freedom in article 25 included not only the freedom "to entertain such religious belief, as may be approved of by his judgment and conscience, but also to exhibit his belief in such outward acts as he thinks proper." [12]

In a subsequent case[13] while interpreting article 26

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9. Adelaide Company of Jehovah's Witnesses v. The Commonwealth, 67 CLR 116, 127(1943). Quoted in Commissioner Hindu Religious Endowments,Madras v. Sri Lakshmindra Tirtha Swamiar of Sri Shirur Mutt, AIR 1954 SC 282,290.

10. 133 U.S. 333 (1890). The definition given therein is discussed at p.130 supra. Criticising that definition he observed for the Court :
"We do not think that the above definition can be regarded as either precise or adequate. Articles 25 and 26 of our Constitution are based for the most part upon Art. 44(2), Constitution of Eire and we have great doubt whether a definition of 'religion' as given above could have been in the minds of our Constitution-makers when they framed the Constitution."
Commissioner Hindu Religious Endowments,Madras v. Sri Lakshmindra Tirtha Swamiar of Sri Shirur Mutt, AIR 1954 SC 282, 290.

11. Commissioner Hindu Religious Endowments,Madras v. Sri Lakshmindra Tirtha Swamiar of Sri Shirur Mutt, AIR 1954 SC 282, 290.

12. Id., at 289 (Emphasis added).

13. Ratilal v. State of Bombay, AIR 1954 SC 388.

Mukerjea, J., ruled that the right to religious freedom extended only to "such overt acts as are enjoined or sanctioned"[14] by one's own religion. While in Shirur Mutt case[15] the Court held that a person had a right to exhibit his belief in such outward acts "as he thinks proper", in Ratilal case,[16] it held that such an overt act should be one which was enjoined or sanctioned by his religion. In another subsequent case, Mohammad Hanif Quareshi v. State of Bihar,[17] the Supreme Court qualified the right in another direction. In this case the impugned statute had prohibited the slaughter of cows. In his judgment, Das, C.J., observed that the Court had first to be satisfied whether the claim that the sacrifice of a cow was "enjoined or sanctioned"[18] by Islam was well founded. On the facts he held that the practice was not "an obligatory overt act for a Mussalman to exhibit his religious belief."[19] He did not, however, enter into the issue raised by the appellants that though the overt act was not enjoined still it

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14. Id., at 391. The full text runs as follows : "Thus, subject to the restrictions which this Article imposes, every person has a fundamental right under our Constitution not merely to entertain such religious belief as may be approved of by his judgment or conscience but to exhibit his belief and ideas in such overt acts as are enjoined or sanctioned by his religion and further to propagate his religious views for the edification of others."
15. Commissioner Hindu Religious Endowments, Madras v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt, AIR 1954 SC 282.
16. Ratilal Panachand Gandhi v. State of Bombay, AIR 1954 SC 388.
17. AIR 1958 SC 731. This case is dealt at some length at pp.232 et. seq. supra and pp. 363-77 infra.
18. Id., at 739. Emphasis added.
19. Id., at 740.

was "certainly sanctioned by their religion."[20] It could be, therefore, concluded that the requirement that an overt act should be enjoined "or" sanctioned, was made stricter in the sense that not only should the practice be sanctioned but it must also be obligatory. It was argued that in place of cow-slaughter, Muslims could slaughter camels on the occasion or make gifts in charity as a substitute. Since an alternative was available the Court seized upon it to declare that slaughtering of cows was not obligatory. Next year the Court clarified the position by holding that the religious freedom is guaranteed to "essential religious practices."[21]

Two years later, the Supreme Court again modified its opinion. In Durgah Committee, Ajmer v. Syed Hussain Ali,[22] the Durgah Khawaja Saheb Act[23] was challenged on the ground that it violated article 26 of the Constitution. In that case the Court held that a practice of religion should be not only essential but an integral part of religion. The Court was of the opinion that unless that additional caution was taken it was possible that secular practices might find place in it owing to some superstitious beliefs prevailing in

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20. Ibid.
21. Sardar Sarup Singh v. State of Punjab, AIR 1959 SC 860, 865. Emphasis added.
22. AIR 1961 SC 1402.
23. Act 36 of 1955.

a religion. The Court said :

> "(T)hat in order that the practices in question should be treated as a part of religion they must be regarded by the said religion as its *essential and integral part*; otherwise purely secular practices which are not an essential or an integral part of religion are apt to be clothed with a religious form and may make a claim for being treated as religious practices within the meaning of Art. 26. Similarly even practices though religious may have sprung from merely superstitious beliefs and unessential accretions to religion itself."[24]

In *Tilkayat Shri Govindlalji Maharaj v. State of Rajasthan*,[25] the Supreme Court reiterated its earlier judgment and laid down that religious freedom was guaranteed only in respect of those practices which were "an integral part of the religion."[26]

Thus we find that the judicial opinion has moved from the view that the practice instead of simply being "enjoined or sanctioned"[27] must be "an integral part of religion."[28] This leads to another question. How are we to decide whether a particular practice is an essential or an integral part of religion or not? Further if the matter is challenged, whether the courts should rely on the religious authority or

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24. *Durgah Committee, Ajmer v. Syed Hussain Ali*, AIR 1961 SC 1402, 1415. (Emphasis supplied).

25. AIR 1963 SC 1638.

26. *Id.*, at 1660.

27. *Commissioner Hindu Religious Endowments, Madras v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt*, AIR 1954 SC 282, 290; *Ratilal Panachand Gandhi v. State of Bombay*, AIR 1954 SC 388, 391.

28. *Durgah Committee, Ajmer v. Syed Hussain Ali*, AIR 1961 SC 1402, 1415; *Tilkayat Shri Govindlalji Maharaj v. State of Rajasthan*, AIR 1963 SC 1638, 1660.

decide themselves? In its earlier decision the Supreme Court took the view that it was for the individual to decide, whether a religious practice was or was not an essential part of his religion. Later cases indicate that it is for the law courts to decide the controversy. In Shirur Muth case, Mukerjea, J., was of the opinion that the question whether a particular practice was an essential part of religion should be decided according to the tenets of the religious sect concerned. He had said :

> "(W)hat constitutes the essential part of a religion is primarily to be ascertained with reference to the doctrines of that religion itself. If the tenets of any religious sect of the Hindus prescribe that offerings of food should be given to the idol at particular hours of the day, that periodical ceremonies should be performed in a certain way at certain periods of the year or that there should be daily recital of sacred texts or oblations to the sacred fire, all these would be regarded as parts of religion... all of them are religious practices and should be regarded as matters of religion within the meaning of Art. 26(b)."[29]

But by 1963, the Court reached the conclusion that only those practices were protected under religious freedom which were integral part of religion. The test is whether the particular community regards it as something essential. If, however, there is a controversy on this matter, the

29. Commissioner Hindu Religious Endowments, Madras, v. Sri Lakshmindra Tirtha Swamiar of Sri Shirur Mutt, AIR 1954 SC 282, 290. Emphasis added.

proper forum to decide is the court. In Tilkayat Shri Govindlalji Maharaj v. State of Rajasthan, Gajendragadkar, J., delivering the opinion of the Court said :

> "This question will always have to be decided by the Court and in doing so, the Court may have to enquire whether the practice in question is religious in character and if it is, whether it can be regarded as an integral or essential part of the religion, and the finding of the Court on such an issue will always depend upon the evidence adduced before it as to the conscience of the community and the tenets of its religion."[30]

This approach of the Indian Supreme Court has been criticised.[31] There is no doubt that the religious freedom could not be extended to a purely secular activity. But in doubtful cases, it is submitted, our courts should accept the contention of a person who claims before the court that a certain practice is of a religious character. Religion is, after all, a matter of faith and it is not only difficult but sometimes impossible to prove the religious beliefs held

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30. Tilkayat Shri Govindlalji Maharaj v. State of Rajasthan, AIR 1963 SC 1638, 1660-1. Emphasis supplied. It may, however, be seen that the Court has admitted, though indirectly, that primarily it is for the community to decide which practice is an integral part of the religion

31. See for example comments by Sivaramayya, B., Matters of Religion, 5 JILI 500, 515, (1963). It has been pointed out that in case of dispute between different sections of a denomination, it is better to treat all the practices claimed by rival groups as religious ones, instead of entering into the merits of the dispute. The Constitution guarantees religious freedom not only to every denomination but to every section thereof.

by a person.[32] If a certain practice has come into being and that practice is observed by a section of the community, it should as far as possible be upheld unless it runs counter to public order and morality etc. As interpreted by the courts article 25(1) gives protection to practices which are integral parts of a religion but such practices are subject to overriding process of the state. Sub-clause (a) saves any law regulating or restricting any economic, political or other secular activity associated with religious practices. This does not contemplate state regulation of religious practices which are protected unless they affect morality, public order or health, but of activities of an economic, commercial or political character, when associated with religious practices. Though the belief in religion appears also to be within the sweep of these restrictions, but the matters of belief and conscience are not by their nature susceptible to any effective control. But if a person manifests his faith it may become sometimes necessary to regulate or restrict it.

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32. In Adelaide Company of Jehovah's Witnesses v. The Commonwealth, 67 CLR 116 at 123 (1943), Latham, C.J., admitted :

"What is religion to one is superstition to another."

See also the remarks of Douglas, J., in United States of America v. Edna W. Ballard, 322 US 78, 86-7 (1944), supra p. 135.

Moreover, clause (2) empowering the state to make laws to regulate and restrict the economic, financial, political or other secular activities which may be associated with religious practices gives wide powers to the state. All religious practices can be brought within one or other secular activity and thus be brought within the controlling power of the state. According to Harry E. Groves :

> "Regarding Article 25, what part of religious practice could not reasonably fall under the control of the heads of public order, morality, health, economic, financial political or "other social"? Could not the state forbid religious parades under public order, plural marriages under morality, piercing the body or fire-walking under health, offering food to an idol or supporting priests under economic, building temples under financial urging members to vote, not vote or ignore the flag under political rubric?"33

The clause further saves laws providing for social welfare and reform or throwing open of public Hindu religious institutions to all classes of Hindus. There are a large number of persons belonging to backward classes and Scheduled castes. The system of polygamy, child marriage, infanticide, human and animal sacrifices, offering of young woman to temples as devadasis and many other customs and usages existed in the society in the name of religion. A large number of Hindus

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33. Groves, Harry E., Religious Freedom, 4 JILI 191, 198 (1962).

were deemed to be untouchables by their own co-religionists[34] as a result of which they were not only disallowed common social contact with them, but they were also not allowed to enter temples and other religious places. All religious observances in the temple were open only to caste Hindus. In order to bring such untouchables to the level of their co-religionists the state is authorised to make laws to give effect to enforce the principles laid down in the Constitution.

In the United States the position is slightly different. The American Constitution has not only recognised the freedom to exercise religion but has also prohibited the state from establishing any religion. This has brought about a separation between the state and the church. As a sequel to this, the state does not, as a general rule, interfere with religious practices for the purposes for which the state in India is authorised to interfere in exercise of the powers guaranteed to it by article 25(2). In the United States, however, the state can control religious practices

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34. Only the other day, Jagadguru Shankaracharya of Govardhan Peeth, Puri, allegedly basing his view on Hindu Sastras, said that the Hindu religion accepted untouchability and that some people take birth as untouchables. Northern India Patrika, April 3, 1969, p.4.

in the interest of public order, morality and health as it can be done in India under article 25(1). It does not, however, control such practices to protect other fundamental rights as is permissible under the Indian Constitution. For example, in the United States if there is a conflict between the property rights and the religious rights, the latter is usually preferred over the former[35] while in India, the former is given preference under the clear provision of article 25(1) which has subjected religious freedom to all other provisions of the third part of the Constitution.

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35. See, e.g., Grace Marsh v. State of Alabama, 326 US 501 (1946), infra p. 359.

Chapter IX

Propagation of Religion

The right to propagate religion is the right to convey one's ideas and beliefs on religion to others so that if they so choose they may accept them for their own good. As propagation aims at converting others to one's own point of view, the person propagating would highlight the good points of his own religion and underrate those of other religions. It is also natural that those whose religion is so denounced might feel deeply hurt. This gives rise to bitterness and ill-feeling, and sometimes leads one to commit acts of violence leading to disturbance of public peace. In such circumstances the government has to be vigilant and if necessary to curb the right of the citizen to propagate his religious convictions. Though the constitutional guarantee of all forms of religious freedom is subject to public order, it is in the case of propagation that the state has to intervene most in order to maintain law and order.

Obviously the right does not justify a person to coerce another to change his religion. It merely gives him the right to communicate his views and ideas to others leaving them to accept them or not. Religious freedom implies that if one wants to follow a particular religion he should not be interfered with in his choice. It would

be wrong, however, to exploit a person's economic distress or to use undue influence or coercion to convert him into another religion. Recently when it was alleged in Indian Parliament that the Christian foreign missionaries "were exploiting the misery of the famine affected people in Bihar and effected hundreds of conversions to Christianity" during their help missions in that state, the minister of state for Home Affairs, Shri V.C. Shukla, although he admitted in the Lok Sabha the fact of conversion, yet he showed his helplessness in the matter as no evidence was forthcoming that compulsion was resorted to. He said that since the Constitution guarantees freedom to propagate one's religion, the interference of the government would not be justified unless it was shown that force or undue pressure was used.[1]

It may be noted that the freedom to 'propagate' has not been specifically mentioned in any of the Constitutions

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1. News item published under the heading "Missionaries exploiting Bihar Famine", Northern India Patrika, June 29, 1967. Jesuit missionary father Vincent Ferror was asked to leave the country as there were complaints against him that he was alluring the poor and inducing them to become Christians and thereby posing a law and order problem. See the statement of Shri V.C.Shukla, Minister of State for Home Affairs, during the Parliamentary questions, Northern India Patrika, August 10, 1969, p.8. It is also reported that though the number of foreign missionaries have come down from 5783 in 1954 to 3796 in 1969, but the remittances they receive has increased from Rs. 9.22 crores in 1956 to Rs. 66.30 crores in 1967. Northern India Patrika, April 19, 1969, p.7.

of the world except our own.[2] Even the Constitution of the Irish Free State[3] does not specifically provide for religious propagation. When the clause relating to religious freedom was taken up for consideration by the Indian Constituent Assembly, some members opposed the inclusion of the right of propagation as being obnoxious. They were

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2. Pylee, *India's Constitution* (1962, Asia Publishing House, Bombay), 113. Opposing the inclusion of the word "propagate", Shri Loknath Misra said in the Constituent Assembly: "Indeed in no constitution of the world right to propagate religion is a fundamental right." *Constituent Assembly Debates*, VII, 822, 824.

3. It may be noted that article 25 of the Indian Constitution is modelled on the basis of the Constitution of the Irish Free State. See *Commissioner Hindu Religious Endowments, Madras v. Sri Lakshmindra Tirtha Swamiar of Sri Shirur Mutt*, AIR 1954 SC 282, 290, *supra* p.268 fn.10. Cf. the original draft prepared by K.M. Munshi with article 44 of the Constitution of the Irish Free State. The original draft was :

   "All Citizens are equally entitled to freedom of conscience and to the right freely to profess and practise religion in a manner compatible with public order, morality or health :

   "Provided that the economic, financial or political activities associated with religious worship shall not be deemed to be included in the right to profess or practise religion."

   Rao, Shiva B., *The Framing of India's Constitution Select Documents* (1967, Indian Institute of Public Administration, New Delhi), II, 76. Art. 44(2) of the Constitution of Ireland (1937) says :

   "(1) Freedom of conscience and the free profession and practice of religion are, subject to public order and morality, guaranteed to every citizen.
   (2) The State guarantees not to endow any religion.
   (3) The State shall not impose any disabilities or make any discrimination on the ground of religious profession, belief or status."

of the opinion that this freedom would help the Christian missionaries to convert Hindus and others to their faith.[4-5] Others took a different view. Pandit Lakshmikanta Maitra, for example, said that religion being the foundation of society in India, the country would lose all her spiritual values and heritage if the right to practise and propagate religion was not recognised as a fundamental right. Referring to the spiritual heritage of India and advocating for the inclusion of the propagation clause, he said :

> "The great Swami Vivekananda used to say that India is respected and revered all over the world because of her rich spiritual heritage..... if we are to educate the world, if we are to remove the doubts and misconceptions and the colossal ignorance that prevails in the world about India's culture and heritage, this right must be inherent, - the right to profess and propagate her religious faith must be conceded...
> "Why is there so much vice or corruption in every stratum of society? Because we have forgotten the sense of values of things which our forefathers had inculcated. We do not at all care in those days, for all those glorious traditions of ours with the result that everybody now acts in his own way, and justice, fairness, good sense and honesty have all gone to the wilderness. If we are to restore our sense of values which we have held dear, it is of the utmost importance that we should be able to propagate what we honestly feel and believe in."[6]

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4. C.A.D., VII, pp. 818-31.
5. It is worth noting that in Nepal "no person (is) entitled to convert another person from one religion to another." Article 14, Constitution of Nepal (1962). Commenting upon a similar provision of 1959 Constitution a commentator says :
   "The role of the missionaries in almost all the African and Asian countries had been of being vanguards of imperial interests and the trouble which India faces with regards to missionary activities fully justifies the banning of missionary and conversion activities on an organised scale."
   Narendra Goyal, *The King and His Constitution* (1959, Nepal Trading Corp., New Delhi).
6. *Id.*, at 832-33.

Some members belonging to the minority community were also very keen on its inclusion in the Constitution. Some persons were of the view that even if the right to propagate religion was not specifically mentioned in article 25, the freedom of expression guaranteed under article 19 would be sufficient guarantee for the propagation of religion. For example, Shri K.M. Munshi visualized this fact, when he said :

> "Even if the word (propagate) were not there, I am sure under the freedom of speech which the Constitution guarantees it will be open to any religious community to persuade other people to join their faith."[7]

However, the right of propagation has been specifically mentioned in the Constitution as a matter of abundant precaution.[8]

It may be noted that article 25 guarantees the right of propagation to "all persons" but does not specifically mention denominations. Also article 26 which guarantees religious freedom to denominations does not mention the right to propagate religion. The Supreme Court in *Commissioner Hindu Religious Endowments, Madras v. Sri Lakshmindra Tirtha Swamiar of Sri Shirur Mutt*,[9] while interpreting the words "all persons" in article 25, noted that the heads of the religious institutions had liberty to propagate their tenets

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7. C.D.A., VII, p. 837.
8. Alladi, *Constitution and Fundamental Rights*, 45.
9. AIR 1954 SC 282.

and doctrines as by nature of things the institutions could act only through human agencies. In the words of the Court:

> "Institutions, as such cannot practise or propagate religion; it can be done only by individual persons and whether those persons propagate their personal views or the tenets for which the institution stands is really immaterial for purposes of Art. 25."[10]

One of the questions that arose in the case concerned the right of Mathadhipati to propagate the tenets of the institution. Mukerjea, J., speaking for the Court reasoned that though the Mathadhipati was not a corporation sole but by virtue of his being the head of a spiritual fraternity, he could act as a religious head of the institution. He had under article 25 a right to practise and propagate the religious tenets of the institution. He might propagate his own personal views or those of the institution to which he belonged. In Ratilal Panachand Gandhi v. State of Bombay[11] also the Court observed that the right of propagation might be used by a person both in his individual capacity and on behalf of an institution.[12]

There are various ways of propagating religion and each may give rise to special problems. The various methods of propagation and the problems involved in each case will now be discussed separately.

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10. Ibid, at 289.

11. Ratilal Panachand Gandhi v. State of Bombay, AIR 1954 SC 388.

12. Id., at 391.

A. Propagation through Distribution of Religious Literature:

The distribution of pamphlets and other literature creates diverse problems. Such distribution may be free of cost or a small amount may be charged for it. In the former case, it is commonly seen that most of the distributed handbills are thrown away on the municipal streets soon after they are distributed; sometimes after they have been read and more often even without being read. In case the literature is being sold, the question of taxation arises. Should religious literature be taxed like other books and journals? Should little children be used to distribute and sell religious literature if they are not allowed to distribute or sell other literature? Should the prohibition of sale on weekly holidays apply to such a distribution? Such questions have arisen in America and have given rise to some controversy as discussed below :

(i) Free Distribution of Religious Literature.

It is the duty of the municipal authorities to keep the streets within their control clean and tidy. In order to achieve this some municipalities in the United States have prohibited distribution of handbills without a permit. For example, in Alma Lovell v. City of Griffin,[13] the impugned ordinance required the obtaining of a permit to distribute

13. 303 US 444.

pamphlets. For the issuance of such a permit no specific standards were laid down. The United States Supreme Court held that unless the refusal was based upon "the maintenance of public order or as involving disorderly conduct, the molestation of the inhabitants, or the misuse or littering of the streets"[14] the ordinance could not be upheld. In several other subsequent cases,[15] the Court took the same view. In _Hague v. Committee for Industrial Organization_, the Police Chief of a certain town, under the authority given by an ordinance, refused to permit the appellants from holding meetings at a certain public place and distributing pamph lets. The United States Supreme Court struck down the ordinance and held,

> "the right peaceably to assemble and to discuss... and to communicate... whether orally or in writing, is a privilege inherent in citizenship of the United States which the (Fourteenth) Amendment protects."[16]

In another case, _Clara Schneider v. State (Town of Irvington)_[17] a certain municipal ordinance prohibited the distribution of handbills and circulars in public streets even to those who were willing to receive them. The idea behind this prohibition was to prevent the littering of streets with bits of

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14. _Id._, at 451.
15. _Frank Hague v. Committee for Industrial Organization_, 307 US 496 (1939), _Clara Schneider v. State(Town of Irvington)_, 308 US 147 (1939) and _Mrs. Ella Jamison v. State of Texas_, 318 US 413 (1943).
16. _Hague v. Committee for Industrial Organization_, 307 US 496, 512 (1939), per judgment of, Roberts, J.
17. 308 US 147 (1939).

paper by persons who after receiving them throw them away. The Supreme Court of the United States held that the constitutional right of freedom of speech and of the press included the freedom to distribute handbills in order to communicate one's ideas to others. The Court observed that the city had a power to prevent street littering. It could penalise those who actually threw papers on the streets, but not those who merely distributed the handbills in order to convey their views to others[18] unless there was "a clear and present danger" to the public order.[19] *Mrs. Ella Jamison v. State of Texas*[20] reiterated the law laid down in earlier cases. It held that a municipal ordinance which forbade distribution of handbills on city streets violated the freedom of the press and also violated the constitutional guarantee of religious freedom if the handbills contained an invitation to participate in a religious activity. The Court further held that the municipality could prohibit the use of streets for the distribution of purely commercial leaflets, even though such leaflets might have "a civic appeal, or a moral platitude" appended but they could not "prohibit the distribution of handbills in the pursuit of a clearly religious activity."[21]

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18. *Id.*, at 162-3.
19. *Charles T. Schenck v. United States of America*, 249 US 47 (1919).
20. 318 US 413 (1943).
21. *Id.*, at 417.

In India also in so far as the distribution of religious literature is concerned, the rule is more or less the same as in the United States. Though unlike American Constitution which guarantees the right to a free press,[22] our Constitution does not specifically mention this freedom, but the courts have in several cases held that the freedom of speech and expression in article 19(1) (a) of the Constitution includes the liberty of the press.[23] This freedom includes the publication and distribution of pamphlets and other literature, whether they are distributed free of charge or for a nominal price. Though there is no direct case on the distribution of religious literature, it is submitted that since the freedom of propagation of religion has been specifically guaranteed in our Constitution, the cases on the freedom of press are equally, and perhaps with more force applicable to the freedom of distributing religious literature. Such cases are briefly given below.

In Romesh Thappar v. The State of Madras,[24] the state of Madras had banned "the entry into or the circulation, sale or distribution in the state of Madras or any part

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22. First Amendment to the U.S. Constitution.

23. Sakal Papers (P) Ltd. v. Union of India, AIR 1962 SC 305, Express Newspaper Ltd. v. Union of India, AIR 1958 SC 578; Virendra v. The State of Punjab, AIR 1957 SC 896, Brij Bhushan v. The State of Delhi, AIR 1950 SC 129, Romesh Thappar v. The State of Madras, AIR 1950 SC 124, Rajni Kant Verma v. State, AIR 1958 All 360.

24. AIR 1950 SC 124.

thereof of the newspaper entitled "Cross Roads" an English weekly published at Bombay."[25] The Supreme Court declared such a ban invalid in so far as the restriction was not directed solely against the undermining of the security of the state. In a later case, Sakal Papers (P) Ltd. v. Union of India,[26] the question was raised in a different manner. In this case the Union Government, acting under the Newspaper (Price and Page) Act, 1956,[27] laid down rules for fixing the price of a newspaper in accordance with the number of pages comprised therein. The idea was to prevent unfair competition and monopoly in big newspapers. But the Supreme Court declared that both the Act and the Order were obnoxious to the freedom of speech and expression.

It may, however, be noted that reasonable restrictions can be placed "in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, defamation

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25. The order was passed under the authority of the Madras Maintenance of Public Order Act 1949 (Mad. Act 23 of 1949), which had authorised the state to make such orders in the interest of the security of the state. Id., pp. 126-7.

26. AIR 1962 SC 305.

27. Act 45 of 1956.

or incitement to an offence."[28] Because of these limits even free distribution of religious literature can be banned if it is in the interest of public order or any other purpose enumerated in clause (2) of article 19. So section 295A of the Indian Penal Code punishes deliberate and malicious acts intended to outrage the religious feelings of any class of persons. If the distribution of religious literature is being made just to outrage the religious feelings of any other section of the community, the same may be punishable under the said section. An unsuccessful attempt was made in *Ramji Lal Modi v. State of Uttar Pradesh*[29] to get the section declared void under article 19(1)(a). The petitioner, who was the editor, printer and publisher of a monthly magazine, 'Gaurakshak', devoted to cow protection, published an article containing comments which the Court found were made with the deliberate and malicious intention of outraging the religious feelings of Muslims. He was accordingly sentenced to imprisonment and fined under section 295A of the Indian Penal Code. He petitioned the Supreme Court challenging the validity of the section itself under article 19(1)(a). But the Court rejected his contention and held that as clause (2) of article 19 authorised

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28. Article 19(2), Constitution of India.

29. *Ramji Lal Modi v. State of Uttar Pradesh*, AIR 1957 SC 620.

imposition of restrictions "in the interest of" and not only "for the maintenance of" public order, the language was wide enough to cover section 295A of the Indian Penal Code. Referring to an earlier Patna case,[30] the Court said :

> "It will be noticed that the language employed in the amended clause (article 19(2), as amended by Constitution (First Amendment) Act, 1951) is "in the interests of" and not "for the maintenance of." As one of us pointed out in Debi Soren v. State of Bihar[31]... the expression "in the interest of" makes the ambit of the protection very wide. A law may not have been designed to directly maintain public order and yet it may have been enacted in the interest of public order."[32]

In a subsequent case, the Supreme Court explained this point as follows :

> "We do not understand the observations of the Chief Justice (in Ramji Lal Modi v. State of Uttar Pradesh)[33] to mean that any remote or fanciful connection between the impugned Act and public order would be sufficient to sustain its validity. The learned Chief Justice was only making a distinction between an Act which expressly and directly purported to maintain public order and one which did not expressly state the said purpose but left it to be implied therefrom, and between an Act that directly maintained public order and that indirectly brought about the same result. The distinction does not ignore the necessity for intimate connection between the Act and the public order sought to be maintained by the Act. "Apart from the said phrase, another limitation in the clause, namely, that the restriction shall be reasonable, brings about the same result.... It has been held that in order to be reasonable, "restrictions must have reasonable relation to the object which the legislation seeks to achieve and must

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30. Debi Soren v. The State, AIR 1954 Pat 254.

31. AIR 1954 Pat 254.

32. Ramji Lal Modi v. State of Uttar Pradesh, AIR 1957 SC 620, 622.

33. AIR 1957 SC 620, 622, ibid.

> not go in excess of that object." The restriction made in "the interests of public order" must also have reasonable relation to the object to be achieved, i.e., the public order. If the restriction has no proximate relationship to the achievement of public order, it cannot be said that the restriction is a reasonable restriction within the meaning of the said clause."[34]

In Ramji Lal Modi v. State of Uttar Pradesh[35] the Court also referred to the fact that the guarantee of religious freedom in the Constitution was made subject to public order. Therefore "restrictions may be imposed on the rights guaranteed by them (articles 25 and 26) in the interests of public order."[36] Moreover, the Court said :

> "S. 295A does not penalise any and every act of insult to ... the religious beliefs of a class of citizens but it penalises only those acts of insult ... which are perpetrated with the deliberate and malicious intention of outraging the religious feelings of that class. Insults to religion offered unwittingly or carelessly or without any deliberate or malicious intention to outrage the religious feelings of that class do not come within the section. It only punishes the aggravated form of insult to religion...."[37]

The Court concluded that an aggravated form of insult to religious feelings was bound to disrupt the public order. A statute which penalises such activities was within the protection of clause (2) of article 19.

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34. The Superintendent, Central Prison, Fatehgarh v. Dr. Ram Manohar Lohia, AIR 1960 SC 633, 639.
35. Ramji Lal Modi v. State of Uttar Pradesh, AIR 1957 SC 620.
36. Id., at 622.
37. Id., at 623.

To sum up, the position is that freedom of press is guaranteed both in India and the United States. This includes the right to distribute religious literature whether free of cost or not. While in the United States such a freedom can be curtailed only if there is a "clear and present danger", in India the area within which restrictions can be imposed is wider. As held in Ramji Lal Modi v. State of Uttar Pradesh[38] article 19(2) authorises the imposition of restrictions not only for proximate danger but also for a remote danger. The words "in the interest of public order" have been held to be wide enough to cover restrictions which are imposed in the interest of public order whether there is an immediate and clear danger to public order or not.[39] There should, however, be an intimate connection between the restrictions placed and the public order sought to be maintained by the Act.[40]

(ii) Taxation on the Sale of Religious Literature.

As already discussed, in the United States a tax on the sale of religious literature is unconstitutional.[41] Even

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38. AIR 1957 SC 620.

39. See also Babulal Parate v. The State of Maharashtra, AIR 1961 SC 884, supra pp. 242-4, in which section 144 Cr. P.C. was upheld.

40. See The Superintendent, Central Prison, Fatehgarh v. Dr. Ram Manohar Lohia, AIR 1960 SC 633.

41. See Robert Murdock v. Commonwealth of Pennsylvania, 319 US 105 (1943), supra pp. 46-9.

if such a tax is non-discriminatory, it is invalid. In Lester Follett v. Town of McCormick, South Carolina,[42] the imposition of a flat tax on book agents who made their livelihood by selling religious books was declared unconstitutional. In this case a license tax was imposed on all persons engaged in the business of book-selling. The appellant who was a Jehovah's Witness earned his livelihood exclusively by selling religious literature. He had no other source of income. Douglas, J., held in clear terms that no tax could be imposed on the sale of religious literature. In the course of the judgment he observed :

> "The exaction of a tax as a condition to the exercise of the great liberties guaranteed by the First Amendment is as obnoxious as the imposition of a censorship or a previous restraint."[43]

He put it even more strongly when he recalled one of his earlier judgments :

> "The power to tax the exercise of a privilege is the power to control or suppress its enjoyment."[44]

In sum, in the United States, taxation is not permissible upon the sale of religious literature even though it brings profit and such profit is exclusively appropriated by an individual on his own account, unconnected with any religious institution. In India the law is different. The

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42. 321 US 573 (1944).
43. Id., at 577.
44. Ibid. Quoted from Robert Murdock v. Commonwealth of Pennsylvania, 319 US 105, 112 (1943).

taxing power of the state to tax the sale of goods[45] can, it appears, cover the sale of religious literature. It is submitted that there is nothing in articles 25 and 26 prohibiting the state from taxing religious literature.

(iii) Sale of Religious Literature by Children.

This point was directly raised in America in Sarah Prince v. Commonwealth of Massachusetts.[46] The question that arose in that case was whether it would be an infringement of religious freedom if children below a particular age, who were prohibited from selling periodicals on streets, were also restrained from selling religious literature? In that case state of Massachusetts had prohibited children from selling books and other trade articles.[47] By an 8 to 1 majority the United States Supreme Court answered in the negative and held that the statute was valid. Rutledge, J., who delivered the majority opinion traced the police power of the state to regulate the exercise of religious freedom.

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45. Item 92, List 1 of Schedule VII of the Constitution authorises the Central Government to tax on the sale or purchase of news papers and advertisements published therein, and under item 54, List 2, the state government is empowered to tax on the sale or purchase of other goods.

46. 321 US 158 (1943).

47. "No boy under twelve and no girl under eighteen shall sell, expose or offer for sale any newspapers, magazines, periodicals or any other articles of merchandise of any description, or exercise the trade of boot-black or scavenger, or any other trade, in any street or public place.' Massachusetts comprehensive child labour law, S.69. Id., at 160-1.

He said that the authority of the state over the activities of children was more extensive than over like actions of adults. A state was under a duty to see the health and well-rounded growth of children. It had to save the children from "the crippling effects of child employment, more especially in public places."[48] The children were subject to emotional excitement, and psychological and physical injury. Rutledge, J., noted :

> "Parents may be free to become martyrs themselves. But it does not follow they are free, in identical circumstances to make martyrs of their children before they have reached the age of full and legal discretion...."[49]

If the state had chosen to prohibit children of certain age groups, there was nothing invalid in it. Murphy, J., in his dissent opined that in the exercise of the right of religious freedom a child no less than an adult be not restricted except when there is a "grave, immediate, (and) substantial"[50] danger to the life, health and welfare of the children by his evangelist activities. Since there was no such danger in the instant case he was of the view that the restricting were unreasonable.

In India, one of the directive principles of state policy provides that "the tender age of children... (is) not

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48. *Sarah Prince v. Commonwealth of Massachusetts*, 321 US 158, 168 (1943).

49. *Id.*, at 170.

50. *Id.*, at 175.

abused and that citizens are not forced by economic necessity to enter avocations unsuited to their age or strength."[51-52] Religious freedom is guaranteed subject to public safety and health. It may well be argued that children would be exposed to danger if they were engaged in distributing pamphlets or other literature on a busy public street. If there is such danger a statutory prohibition would be fully justified.

(iv) Sunday Laws and the Distribution of Religious Literature.

In India, as also in the United States, laws have been passed making Sunday or some other day of the week as a weekly public holiday. This rule may well equally apply to the sale and distribution of religious literature. In the United States, though originally weekly holidays were enforced on Sundays, that being a Christian rest day,[53] the

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51. Article 39(e) of the Constitution of India.

52. Section 3 of the Employment of Children Act, 1938 (Act 26 of 1938), as also Section 67 of the Factories Act, 1948 (Act 63 of 1948) prohibit employment of children below a certain age in certain occupations only.

53. "Remember the sabbath day, to keep it holy. Six days shalt thou labour and do all thy work: But the seventh day is the sabbath of the Lord thy God: in it thou shalt not do any work...."

Exodus 20: 8-10.

"ye shall keep the sabbath therefore; for it is holy upto you: every one that defileth it shall surely be put to death: for who so ever doeth any work therein, that soul shall be cut off from among his people. Six days may work be done; but in the seventh is the sabbath of rest, holy to the Lord; whosoever doeth any work in the sabbath day, he shall surely be put to death."

Exodus 31: 14,15.

courts have upheld them principally on grounds of health as a day of rest and recreation.[54] Later on different days in the week were fixed for different communities out of regard for their religious views.[55] As their main purpose is to provide rest on a particular day, there is nothing religious about them so as to come within the scope of establishment clause. In L.E. Hennington v. State of Georgia, Bleckley, C.J., said :

> "With respect to the selection of the particular day in each week which has been set apart by our statute as the rest day of the people, religious views and feelings may have had a controlling influence. We doubt not that they did have; and it is probable that the same views and feelings had a very powerful influence in dictating the policy of setting apart any day whatever as a day of enforced rest. But neither of these considerations is destructive of the police nature and character of the statute."[56]

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54. L.E. Hennington v. State of Georgia, 163 US 299(1896), Paul J. Petit v. State of Minnesota, 177 US 164(1900); Margaret M. McGowan v. State of Maryland, 366 US 420 (1961), Joshua Levering v. George Means Williams, 4 ALR 374 (1919 Maryland Ct. of App.), E.E. Elliott v. State of Arizona, 46 ALR 284 (1926, Arizona Sp. Ct.).

55. Abraham Braunfeld v. Albert N. Brown, 366 US 599 (1961), Gallagher v. Crown Kosher Super Market of Massachusetts, 366 US 617 (1961), Adell H. Sherbert v. Charlie V. Verner, 374 US 398 (1963).

56. 163 US 299, 306 (1896).

If on account of religious scruple, a person chooses to close his business on any other day of the week he may be required to close it on the fixed weekly holiday as well. It may be considered expedient not to relax the law relating to Sunday closing in any particular case. In Abraham Braunfeld v. Albert N. Brown,[57] an orthodox Jewish merchant, who used to observe Saturday as the Sabbath day, claimed that he might be exempted from the Sunday closing laws as otherwise he would have to close his business on two days of the week. He argued that in case he did not close on Saturday, he would have to give up his Sabbath observance which he asserted was a basic tenet of his faith. The United States Supreme Court rejecting his claim held that the compulsory Sunday closing law could not be relaxed in favour of the followers of those religions who observed Sabbath on a day different from Sundays. If they were allowed an exemption, this might create various other problems. This would provide them an economic advantage over their competitors who had to close their business on Sundays. There might be a temptation in those who observed Sunday closing to keep their business open on Sundays. It was also possible that the persons exempted from Sunday laws would

57. 366 US 599 (1961).

have to employ persons who would prefer to observe holiday according to the wishes of their employer.

In India, the Weekly Holidays Act, 1942[58] merely directs for the closure of shops on one day of the week, which is to be chosen by the shop-keeper himself.[59] This enactment has given a very wide power to the employer in respect to the selection of the day for such closing.[60] In order to bring uniformity in the closure of shops in a given locality, certain states have passed state weekly holiday legislations[61] requiring the concurrence of state officers in the closure of business in a certain locality.

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58. Act 18 of 1942.

59. Section 3 says:

"Every shop shall remain closed on one day of the week, which day shall be specified by the shop-keeper in a notice permanently exhibited in a conspicuous place in the shop."

Section 2(d) defined a shop as including "any premises where any retail trade or business is carried on, including the business of a barber or hair dresser, and retail sales by auction, but excluding the sale of programmes, catalogues and other similar sales at theatres."

60. The Weekly Holidays Act applies whether a shopkeeper has any employee or not. See State v. Gopal, 36 Pat 63 (1956), Sadasivam v. State of Madras, AIR 1957 Mad 144.

61. E.g. Uttar Pradesh Dookan aur Vanijya Adhisthan Adhiniyam, 1962 (U.P. Act 26 of 1962), Punjab Shops and Commercial Establishment Act 1958 (Punjab Act 4 of 1958); the Madras Shops and Establishment Act 1947 (Madras Act 36 of 1947); the Central Provinces & Berar Shops and Establishment Act, 1947 (C.P.& B. Act 22 of 1947); the Bihar Shops and Establishment Act, 1954 (Bihar Act 8 of 1954).

For example, the Uttar Pradesh Act provides that the choice of a close day, is to rest with the employer[62] subject to the approval of the authority appointed by the state Government. This shows that, in India, the weekly holiday has, since its inception, based only on health grounds. The employer or the owner of the establishment in a locality is free to choose any day whether the same be prompted by religion or otherwise. Once a day is fixed for such closure, it is to be observed by all persons concerned. Consequently, the weekly holiday laws can be validly applied to prohibit the sales of religious literature.

B. Propagation Through Phonographs and Loudspeakers.

A common method of propagation nowadays is the use of loudspeakers. Such sound amplifiers blare out religious propaganda in public places. Sometimes in order to convey the same message to people in different places gramophone and tape-records may also be used. At the same time the use of amplifying devices might disturb peace and comfort of people who want to live in quiet.[63] There is also a danger

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62. Section 8(2) of the Uttar Pradesh Dookan aur Vanijya Adhisthan Adhiniyam 1962, (U.P. Act 26 of 1962).

63. E.g., in Masud Alam v. Commissioner of Police, AIR 1956 Cal 9, the Commissioner refused to grant permission for loudspeakers as several residents of the locality had complained against the use of the same.

of disturbance as the people hostile to such propaganda might become excited and take law in their own hands.[64] People may also collect on the streets and disturb the easy flow of traffic on public streets. In order to maintain law and order, it may sometimes become necessary for the police to take precautionary measures. On the one hand people are free to propagate and even denounce other religions, and on the other, there is necessity to prevent any disturbance which might be caused by such religious demonstration. But the authorities under the guise of maintaining law and order might be tempted to stifle religious propaganda. The police should, therefore, be not given uncontrolled power to unduly interfere with the right of propagation.

In the United States, a large number of cases have arisen, but the law is still not quite clear.[65] The problem has arisen chiefly in connection with the activities

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64. In one case when some muslims had claimed that music should not be played during their prayers, the magistrate actually ordered that no music should be played within 40 paces from the mosque and the order was upheld under section 30 of the Police Act, 1861. Laxmikant Balwantrao Deshmukh v. Emperor, AIR 1943 Nag 190.

65. See a clear admission of this statement by Frankfurter, J., in Daniel Niemotko v. State of Maryland, 340 US 268, 280 (1951).

of Jehovah's Witnesses.[66] The first important pronouncement on the right to propagate religion was made by the United States Supreme Court in *Jesse Cantwell v. State of Connecticut*.[67] In that case, the appellant, Cantwell, a Jehovah's Witness, played a gramophone record in a public place containing the messages of the 'Witnesses' attacking Roman Catholics. Two persons who happened to be there agreed to listen to the record. They became annoyed and on their protest, Cantwell moved away from that place. But soon after, he was arrested and convicted under the common law offence of inciting a breach of peace. The conviction was upheld by the state Supreme Court. Against this conviction he appealed to the United States Supreme Court. The Court set aside the conviction and held that a person could not be convicted if he merely discussed religious affairs or played gramophone records on public streets unless there was "clear and present menace to public

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66. The Witnesses having armed themselves with materials necessary for propagation, go about from place to place, hold street-corner meetings, distribute literature, criticise different religions and request their listners to follow their views. The main attack of these Witnesses is against the Roman Catholic religion which is the most well-organised Christian faith. In those parts of the country in the United States where the Catholics are in a majority, they got different laws adopted locally to punish the Witnesses as their propagation in most cases outraged public feeling. The Witnesses, on the other hand, claim the constitutional freedom to propagate their religious belief under the free-exercise clause.

67. 310 US 296, (1940).

peace and order."[68] The Court remarked :

> "No one would have the hardihood to suggest that the principle of freedom of speech sanctions incitement to riot or that religious liberty connotes the privilege to exhort others to physical attack upon those belonging to another sect. When clear and present danger of riot, disorder, interference with traffic upon the public streets, or other immediate threat to public safety, peace, or order, appears, the power of the state to prevent or punish is obvious."[69]

The Court found that the appellant played the record before a willing listener in an effort to persuade him to purchase a book and to contribute money for the advancement of the doctrines of his religion which he asserted were true ones. The Court pointed out that a person who tried to persuade others to his own point of view, sometimes "resorts to exaggeration and even to false statement", but in spite of the probability of excesses and abuses, the liberties, were essential to enlightened opinion and right conduct on the part of the citizens of a democracy.[70]

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68. Jesse Cantwell v. State of Connecticut, 310 US 296, 311 (1940).

69. Id., at 308. Emphasis supplied.

70. In India an attempt is in the offing that section 153A Indian Penal Code be so amended as to make an activity criminal, if it promotes or attempts to promote, on grounds of religion, race, caste or community, a feeling of enmity or hatred between different religious groups. The publication of alarming news and views are also to be made an offence. News item on the recommendations of the National Integration Council, Northern India Patrika, June 23, 1968, p.4. It is submitted that such a law might made the activities of the Witnesses as happened in the Cantwell case a criminal offence.

Within a period of two years of the Cantwell case[71] another case involving a Witness came before the United States Supreme Court. In Walter Chaplinsky v. State of New Hampshire,[72] a Witness was convicted for violating a state statute which made it a crime to "address any offensive, derisive or annoying word to any person who is lawfully in any street or other public place, or call him by any offensive or derisive name."[73] In the Cantwell case[74] the Court had admitted that the religious freedom did not imply an unlimited freedom. In the instant case, the Witness was accused of abusing a public officer.[75] The appellant defended himself by saying that he had abused the officer because he had interfered with his freedom of speech. The Court, while upholding the conviction, held that the freedom of speech, as well as the freedom of religion were not unlimited. Accordingly, a state statute which penalised persons for utterances having a tendency to cause immediate breach of

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71. Jesse Cantwell v. State of Connecticut, 310 US 296 (1940).
72. 315 US 568 (1942).
73. Public Laws of New Hampshire, Chap. 378, s.2, Id., at 569.
74. Jesse Cantwell v. State of Connecticut, 310 US 296 (1940).
75. He had remarked upon the officer :
"'you are a God damned racketeer', and 'a damned Fascist and the whole government of Rochester are Fascists or agents of Fascists.'"
Walter Chaplinsky v. State of New Hampshire, 315 US 568, 569 (1942).

peace was constitutional. Murphy, J., speaking for the Court said :

> "There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words - those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value or a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."76

As a result it was decided that a police officer acting in pursuance of such authority acted legally and the appellant therefore had been rightly convicted.

In Samuel Saia v. People of the State of New York,[77] the appellant, who was a Jehovah's Witness, had applied for a licence to use a loudspeaker in a certain park but it was refused. The ordinance required a licence for sound amplification devices in public places. It did not prescribe any standard for the issue of such licences. The refusal was based on the ground that there were complaints about the noise from amplifiers used on previous occasions in the park. It is important to note that the licence was not refused because the speeches might contain objectionable

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76. Id., at 572.

77. 334 US 558 (1948).

matter.[78] The United States Supreme Court in a 5 to 4 judgment held the ordinance unconstitutional as it established "a previous restraint on the right of free speech in violation of the First Amendment."[79] The Court, following the Cantwell[80] and other cases,[81] also took the view that as there were no standards prescribed for the exercise of the discretion by the police chief, the ordinance should not be upheld.

Soon after the Saia case,[82] noted above, another case[83] came up before the American Supreme Court in respect of another ordinance which was similar to the ordinance involved in the earlier case. This time though the Court was divided on details but it upheld the constitutionality of the ordinance. A part of the Court held that as the amplifiers emitted "loud and raucous" noise, the ordinance prohibiting them was valid. The other part of the Court, however, was of the view that the ordinance was valid

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78. In India, the police authorities do prohibit the use of amplifiers merely because it would create noise which the inhabitants of a locality might not like because of various reasons. See, for example, Maqsud Alam v. Commissioner of Police, AIR 1956 Cal 9 infra p. 310.

79. Samuel Saia v. People of the State of New York, 334 US 558, 559-60 (1948).

80. James Cantwell v. State of Connecticut, 310 US 296(1940).

81. Alma Lovell v. City of Griffin, 303 US 444(1938) and Frank Hague v. Committee for Industrial Organization, 307 US 496 (1939).

82. Samuel Saia v. People of the State of New York, 334 US 558 (1948).

83. Charles Kovacs v. Albert Cooper, 336 US 77 (1949).

irrespective of the noise produced by the amplifiers. These cases show that the law is not settled and different views are possible in the matter.

In India, the Constitution provides that religious freedom is subject to public order. The provisions of the Indian Penal Code, the Code of Criminal Procedure and the Police Act have conferred wide powers on the authorities to prevent the disturbance of public peace and tranquility. In certain circumstances, where there is an apprehension of breach of peace, certain authorities have even been empowered to take preventive measures.[84] Such steps may include banning of the use of loudspeakers in public places.[85]

A case can always be made out when the authorities charged with law and order impose restrictions on the use of loudspeakers, gramophones and playing of music in public places. In India, such occasions have usually arisen at times of communal tension when Hindus take out religious processions using music near the vicinity of a mosque. This is often resented to by Muslim worshippers in the mosque. In such circumstances the police authorities usually prohibit the playing of music near the mosque particularly during prayer times. In Laxmikant Balvantrao Deshmukh v. Emperor[86]

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84. See section 144, Code of Criminal Procedure, 1898 (Act 5 of 1898), and section 30 of the Police Act, 1861 (Act 5 of 1861).

85. See Indulal K.Yagnik v. State, AIR 1963 Gujrat 259.

86. AIR 1943 Nag 109.

the processionists were ordered by the police to desist from music within 40 paces of a certain mosque. Upholding the prohibitory order, the High Court held that section 30(4) of the Police Act gave the police authorities the right to regulate the playing of music on public highways. If the police authorities, in the exercise of this power, even prohibit the use of music at a particular place or at a particular time, such an order was justifiable. In an earlier case, however, an order permanently banning the use of music by any procession at a particular religious place was held obnoxious. In Muthialu v. Bapun,[87] the magistrate's order directing that all music should cease when any procession passed near a certain mosque was held by the Full Bench of the Madras High Court invalid. Similarly, in an Allahabad case,[88] the police authorities, acting under section 30(4) of the Police Act, issued an order during the Holi festival that no crowd attended by music should pass within certain prohibited parts of the city. In an appeal preferred against the conviction for breach of this order, the High Court adopted the Madras view that the police authorities, in the guise of regulating music under section 30(4) of the Police Act had no power to

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87. 2 Mad 140 (1880). Later on it was approved in Sundram v. Queen Empress, 6 Mad 203 (1883).

88. Shankar Singh v. Emperor, AIR 1929 All 201.

ban it entirely.[89] This question was recently raised before the Supreme Court in the unreported case of *Piru Bux v. Kalandi Pati Rao.*[90] The leaders of Hindus and Muslims of certain villages had entered into a compromise in 1931 that the Hindus should not play music near a certain mosque in order to enable the Muslims to hold their prayers in a calm atmosphere. In this case the Hindus instituted the suit for a declaration that the compromise was not binding on them and they were entitled to play music in religious and non-religious processions on the highway. Though the First Additional sub-Judge, Cuttack had held that the petitioners could take out the procession accompanied by "music in a low sound except drum beating," the Orissa High Court did not agree and held that such restrictions were not valid. On appeal, the Supreme Court upheld the judgment of the High Court and held that the restrictions on playing music and beating drums by the Hindus of the village near the mosque was unjustified.

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89. Under Section 296 of the Indian Penal Code punishment is provided for a person who voluntarily causes disturbance to any "assembly" lawfully engaged in the performance of religious worship. It may be noted that there is objection to playing of music if prayers are being read in an assembly, although such an assembly might consist of 2 or 3 persons only. See *Emperor v. Aftab Mohammad Khan*, 1940 All 291, where the assembly consisted of three persons only.

90. *Piru Bux v. Kalandi Pati Rao*, Civil Appeal No.28 of 1966 decided on 29.10.1968 by the Supreme Court of India.

The question of the use of loudspeakers for religious purposes arose before the Calcutta High Court in Masud Alam v. Commissioner of Police.[91] A system was introduced in certain mosques in Calcutta to call for the prayers through an electrical loudspeaker five times a day. The Commissioner of Police issued licence for the use of loudspeakers to two mosques but refused in the case of certain other mosques on the ground that several residents of the locality had complained about loudspeakers. The High Court upheld the refusal and quoted with approval the judgment of Chagla, C.J., in a Bombay case,[92] to the effect that if religious practices ran counter to public order, they were to give way to the good of the people at large. As to the contention that the loudspeakers were allowed in two other mosques, the Court said that the practice deserved to be discouraged as the indiscriminate use of electric loudspeakers in connection with religious festivals in the city caused annoyance to a large section of inhabitants of the city. The Court was also critical of this practice usually adopted "in connection with the

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91. AIR 1956 Cal 9.

92. The State of Bombay v. Narasu Appa Mali, AIR 1952 Bom 84

Hindu festivals, when the city is racked with the raucous cacophony of a thousand loudspeakers, doling out cheap jazz or cinema music, which is not only singularly inappropriate to such occasions but ... destructive of public health and morals."[93] Apart from the right of religious propagation in article 25, the right to use loudspeakers has also been held to be implied in the right to the freedom of speech and expression. This question was directly raised in *Indulal K. Yagnik v. State* before the Gujrat High Court in a case under article 19(1)(a).[94] The Court referring to the cases in which it was held that the freedom of speech and expression included the freedom of the press,[95] observed that the freedom of expression would have no meaning if a person was not allowed all the available means including mechanical devices such as microphones to communicate his ideas to others :

> "Thus the essence of the right does not consist in merely making use of the human voice, but, it lies in the ability to convey one's views to others... The essence of the right consists in giving an opportunity to the citizen to reach the minds of his fellow citizens and, thereby, to give him the chance to convert them to his own views.... If the mechanical appliances and instruments other than the press can help citizen in reaching a wider circle of audience than the limits of his voice can permit, there does not appear to be any good reason why the citizen should not be permitted to avail himself of them.... If the journalist can avail

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93. *Masud Alam v. Commissioner of Police*, AIR 1956 Cal 9,10.
94. *Indulal K.Yagnik v. State*, AIR 1963 Gujrat, 259, 263.
95. For such cases see *supra* n.23.

> himself of the mechanism of his press for reaching a wider circle of audience, there is no reason why a person, who has at his disposal a more modest instrument like the microphone, should not avail himself of that instrument."98

The Court, however, admitted that the right to use loud-speaker was subject to a reasonable order made by the authorities. It was also possible that though as a general rule the authorities should not ban the use of it, they could prohibit its use if it was intended to be used in or near any public place. It may be noted that clause (2) of article 19 allows reasonable restrictions in the interest of public order. Consequently, if a person wants to use the loudspeaker at a public place, and the authorities, in the circumstances of the case, think that such use should be banned in the interest of public order, they are justified in doing so. Even in the instant case the Gujrat High Court did not find the restrictions imposed by the District Magistrate obnoxious, as the permission to use loudspeaker at a public place for holding a political meeting was sought and the authorities in their discretion had disallowed it.

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98. Id., at 264.

Broadly speaking, every one is free in the exercise of his right to the freedom of religious propagation and that of freedom of speech and expression to make use of all lawful means including loudspeakers to propagate his religion. But both in India and the United States, the power to control and even to ban such use for the maintenance of public peace and tranquillity exists. It may, however, be noted that the law in the two countries is slightly different. While in the United States the use of loudspeakers may be prevented if there is a 'clear and present danger' to public peace and tranquillity, in India the authorities have a wider power and they can 'in the interest of public order' ban or regulate such use. The American courts have upheld the right of the people to use loudspeakers for purposes of propagation. The approach of the courts in India is not the same. In Masud Alam case the annoyance to residents was a factor so important that the use of mechanical devices to call for prayers could be prohibited. The Court argued :

> "What is distasteful and abhorrent in the house of man is singularly inappropriate and even irreverent when used in the house of God."[97]

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97. Masud Alam v. Commissioner of Police, AIR 1956 Cal 9, 10.

The American case, Samuel Saia v. People of the State of New York[98] suggests that such a decision might not have been taken by the courts in the United States.

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98. 334 US 558 (1948). Supra n. 77.

Chapter X

Conclusion.

The concept of religion is not capable of being circumscribed within the limits of a definition. Religious ideas differ from society to society and even from person to person. There are a large number of well-recognised religions in the world. Their basic concepts do not find universal acceptance. People may hold different views on religious matters. The Constitutions of both India and the United States guarantee freedom of conscience so that every individual is left free to adopt any religion or no religion at all as his conscience might dictate. The constitutional position in the United States is that there are limitations on the profession, practice and propagation of religion but so far as matters of conscience are concerned they have been left untouched. In India the terms of article 25 of the Constitution can be interpreted to mean that freedom of conscience is not out of the reach of the arms of law though it may be difficult to probe the conscience of an individual. One field in which the problem of conscience has acutely arisen is the claim for exemption from the military service. In the United States as the Constitution is silent on the point, exemptions granted on conscientious

grounds have been upheld. But in India the position seems to be different. Article 25(2) roundly forbids the state to grant exemption from compulsory service on grounds of religious susceptibilities.

In the United States statutory laws providing for compulsory salutes to the national flag have raised pointedly the question of the freedom of conscience. On the analogy of the freedom of speech, the American courts have taken the view that a law which compels a flag salute is invalid. Since freedom of speech implies *freedom not to speak*, *a flag salute which is indirectly* a matter of expression indicating loyalty towards the national flag amounts to a type of expression. That being so, the American courts have taken the view that a compulsory flag salute cannot be validly imposed. In India there is no decided case on the point. But as under the Constitution the freedom of speech and expression is guaranteed the courts in India might take the same view as the American courts. Moreover, restrictions on freedom of speech which have been specifically mentioned in the Indian Constitution do not cover flag salutes. It therefore appears that the state in India cannot compel a person to salute the national flag, particularly if he has any religious objections.

Religious festivals and observances are commonly held in schools and colleges. In the United States religious instruction, Bible reading, prayer and other types of religious practices in schools have been held unconstitutional. If any religious practice takes place outside the campus within the school timings, it is not objectionable if there is no compulsion put on students to attend it. In India such religious practices, prayers, religious book readings and even religious instructions are not prohibited if held in private and aided schools. But in schools maintained by the state, such practices are not allowed except when the state establishes an educational institution under an endowment or trust which makes the performance of religious practices compulsory.

The profession of religion receives greater protection in the United States than in India. The courts in India have disapproved the practice of cow-sacrifice recognised by a particular religion on the ground that it is not an essential part of religion. The American courts might have possibly taken a different view. In spite of various social problems created by the 'Jehovah's Witnesses', and there being a danger of a breach of peace in certain situations, the American courts have upheld the contention of the 'Witnesses' that every one is free to hold religious worship on the public streets and parks.

The authorities may not interfere unless rioting or disturbance takes place or there is imminent danger of violent disorder. But in India the government is given wider powers. Owing to communal problem elaborate precaution is usually taken when a religious function is held in a public place. The regulative laws made in this respect have been generally upheld by the courts.

The profession of religious belief by means of worshipping in one's own religious institution has, however, created difficulties in both the countries. The so-called untouchables in India are not welcomed in Hindu temples. Similarly, the negro Christians in the United States are not welcomed in the churches in which white people worship. In India, the Constitution has specifically prohibited such discrimination. A number of statutes passed by the Central and state legislatures have attempted to do away with this social evil. In the United States, presumably because of the non-establishment theory, the state has not been able to prevent it and the discrimination is still practised on racial grounds. The discrimination in public accommodation and school admission has, however, been, it appears, successfully tackled.

As regards the practice of religion, it may be noted that in India under clause (2) of article 25 the

state can control almost any practice whatsoever on the various grounds enumerated therein. In the United States though the state can control religious practices on grounds of public order, health and morality, but it seems that it cannot regulate them under the various other grounds mentioned in article 25(2) of our Constitution.

As a matter of law the propagation of religion is allowed in both the countries. The state reserves the power to control such propagation for the purposes of maintaining public peace. The courts in the United States are, however, more liberal in this respect. In India the religion of the majority community is not a missionary religion and its followers are not interested in propagating and persuading others to adopt their faith. Consequently it does not look favourably on the minorities utilising this right for purposes of propagation and conversion of others to their faith.

PART THREE

RESTRICTIONS UPON THE FREEDOM OF RELIGION

Chapter XI

Introduction

Religious freedom like other freedoms is not absolute and is limited in various ways. Though in the United States the Constitution guaranteed the free exercise of religion in absolute terms, the course of judicial decisions has been to put restrictive interpretations on them in the interest of public peace, morality and health, and national integrity. In India, apart from the limitations which are usually recognised in the United States, there are a number of other restrictions on religious freedom because of widespread illiteracy and unemployment, and superstition. The Constitution, therefore, does not start with the assumption that religion may freely be practised or that beliefs which are religious deserve full protection.[1] Like many of other articles of the Constitution article 25 sets out a general proposition as to religious freedom subject to so many qualifications and restrictions. They are considered separately in the following pages.

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1. Cf. the statement of Shri K.Santhanam made in the Constituent Assembly :
   "(A)rticle 19 (now article 25) is really not so much an article on religious freedom, but an article on, what I may call religious toleration....

   "Hitherto it was thought in this country that anything in the name of religion must have the right to unrestricted practice and propagation. But we are now in the new Constitution restricting the right only to that right which is consistent with public order, morality and health."

   Constituent Assembly Debates, VII, p. 834.

Chapter XII

Restrictions on grounds of Public Order.

In modern times in every democratic country there is freedom of thought, conscience and religion, and freedom to manifest one's religion or belief in teaching, practice and observance. But the freedom of the individual has to be balanced with the security and well being of the society. This being so, legal restraints on freedom of religious expression of society are often imposed.

In the United States the state has the power to impose restrictions on religious propaganda if there is a clear and present danger to public peace by such activities. But it seems that the restrictions would not be justified if there is simply apprehension of breach of peace. For example, in Jesse Cantwell v. State of Connecticut[1] the conviction of a Jehovah's Witness was set aside by the United States Supreme Court on the ground that there was "no such clear and present menace to public peace and order as to render him liable to conviction of the common law offence."[2]

Of the same import is Daniel Niemotko v. State of Maryland,[3] where the 'Witnesses' were arrested and a fine was imposed on them for preaching in public parks without

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1. 310 US 296 (1940).
2. Id., at 311.
3. 340 US 268 (1951).

permit. But the United States Supreme Court, set aside the conviction and held that a statute giving the authorities untrammelled discretion to allow or disallow religious or political meetings was not valid. The Court emphasised that the streets and parks have since immemorial times been used for holding meetings and religious discourses.[4] As observed by the Court, statutory power could be given in order to prevent serious interference with the normal use of streets and parks, but a public official could not be given unfettered discretion to grant or withhold licences and thereby to impose pre-censorship.

There are, indeed, cases in the United States where the convictions have been upheld mainly on the ground of public peace and order, but in all such cases there was an 'imminent and clear danger' to public peace. So in Walter Chaplinsky v. State of New Hampshire,[5] the American Supreme Court affirmed the conviction of a Witness for abusing a public servant who was present on the street to discharge a lawful public duty. In this case the impugned statute[6] prohibited every person from using any offensive, derisive or annoying word or to make any noise or exclamation in a

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4. See also Frank Hague v. Committee for Industrial Organization, 307 US 496 (1939).
5. 315 US 568 (1942).
6. Public Laws of New Hampshire, Chap. 378, s.2, id., at 569.

public place which might offend another or prevent the other from pursuing his lawful business or occupation. The appellant challenged the validity of the statute on the plea that it unreasonably restrained freedom of speech, press and worship. Murphy, J., upholding the conviction held that the statute was meant only to regulate inflammatory speeches. The freedom of speech and worship etc. "would not cloak (a person) with immunity from the legal consequences for concomitant acts committed in violation of a valid criminal statute."[7]

In India too statutory restrictions have been imposed on religious practices in the interest of public order. Thus chapter 15 of the Indian Penal Code declares certain acts to be offences if they tend to create a breach of peace. Here various communities with diametrically opposed ideologies live together, and naturally it is not possible to permit them all to practise their different religious beliefs to their fullest extent. Sections 295 to 298 of the Indian Penal Code are intended for the keeping of peace than for the protection of religion as such. These sections deal with cases where a person performs an act whereby the religious feelings of any class of persons are wounded. Section 295A specifically limits the religious freedom of

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7. Id., at 571.

propagation by making it an offence to outrage the religious feelings of any class of citizens by insulting or attempting to insult the religious beliefs of that class.[8] The effect is that the majority can no more insult the religions of the minorities than the latter can outrage the religious feelings of the majority. For example, in _Public Prosecutor v. P. Ramaswami_,[9] where the respondent published certain articles with malicious intention of outraging the religious feelings of the Muslims,[10] the Madras High Court found him guilty of section 295A. The Court referred to the Supreme Court case of _S. Veerabadran Chettiar v. E.V._

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8. "Whoever, with deliberate and malicious intentions of outraging the religious feelings of any class of citizens of India, by word either spoken or written, or by signs or by visible representations or otherwise insults or attempts to insult the religion or the religious beliefs of that class, shall be punished..."
Section 295A of the Indian Penal Code as amended by the Indian Penal Code (Amendment) Act, 1961 (Act 41 of 1961).

9. AIR 1964 Mad 258.

10. The author of those articles had criticised various injunctions of Quran. He was critical of the punishment of stoning to death of persons found guilty of adultery which according to him was inconsistent with the provisions for divorce, remarriage and allowing a person to have as many as four wives. He criticised the punishment prescribed for theft, which according to Quran is cutting off both the hands. Because of these provisions he opined :

"When all these are taken into consideration it is clear that Allah is an absolute fool who is unable to understand what is meant by adultery....

"A foolish and barbarous person like Allah has no place in this world..."

_Id._, at 258-9.

Ramaswami Naicker,[11] to the effect :

> "(T)he Courts have to be circumspect and pay due regard to the feelings and religious emotions of different classes of persons with different beliefs, irrespective of the consideration whether or not they shared those beliefs or whether those beliefs were rational or not in the opinion of Court."[12]

The constitutional right, whether of speech and expression or of conscience or right to freely profess, practise and propagate religion is subject to public order and other restrictions.[13] A person cannot in the exercise of his freedom injure the religious feelings of others. Similarly, in Saidullah Khan v. State of Bhopal,[14] the accused, who threw a burning cigarette on 'Viman', an object held sacred by the Hindus, was punished. Of the same import is Kitab Ali Munshi v. Santi Ranjan Deb.[15] The accused were convicted for slaughtering a bullock in open public place on Bakr-Id day. If there is no intention to outrage the

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11. AIR 1958 SC 1032.
12. Public Prosecutor v. Ramaswami, AIR 1964 Mad 258, 259.
13. See also Baba Khalil Ahamad v. State, AIR 1960 All 715 (SB).
14. AIR 1955 Bhopal 23.
15. AIR 1965 Tripura 22.

religious feelings of others the position might be different.[16]

Under Section 153A of the Indian Penal Code,[17] it has been made a criminal offence to promote, on grounds of religion, race, language, caste or community, enmity between different religious, racial or language groups. The section further declares an act as a criminal offence if it is prejudicial to the maintenance of harmony between different religious groups or is likely to disturb public tranquillity. The same is the object of section 34 of the Police Act which prohibits the slaughter of cattle or indecent exposure of one's person on any road, thoroughfare or other public place. As noted elsewhere Muslim law enjoins slaughter of a cattle on the Bakr-Id day.[18] Even so this practice can be restricted in the interest of law and order. For instance, it can be laid down that such slaughter should take place only in specified places. In order to maintain communal harmony a number of states have

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16. See _Chakra Behera_ v. _Balakrushna Mohapatra_, AIR 1963 Orissa 23.

17. As amended by the Indian Penal Code (Amendment) Act, 1961 (Act 41 of 1961).

18. _Supra_ p. 231 fn. 15.

passed legislations prohibiting slaughter of cows and other animals held sacred by certain communities.[19] The nature of this religious practice was considered in the Supreme Court case of Mohammad Hanif Quareshi v. State of Bihar.[20] It was urged that the freedom of Muslims to practise their religion had been infringed by statute prohibiting the slaughter of cows. In rejecting this plea, the Court held that slaughtering cows was not an integral and essential part of the religion professed by the complainants and that article 25 of the Constitution did not protect this observance. Cow slaughter being provided only as an alternative to the slaughter of other animals, it could not be given absolute protection.

Under the Criminal Procedure Code the police is under a duty to prevent breach of public order and peace. The Code gives wide powers to control the movement of persons in groups and in processions.[21] In an old case,

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19. See infra, p. 363.

20. AIR 1958 SC 731.

21. Section 107 empowers a magistrate to ask for the execution of a bond, with or without sureties, for keeping peace if he is informed that any person is likely to commit a breach of peace or disturb public tranquillity. Section 123(5) authorises the magistrate to detain such a person in custody if he fails to give the required security. Section 127 further empowers a magistrate and an officer in charge of a police station to disperse any assembly of five or more persons which is likely to cause a disturbance of the public peace. Section 144 empowers certain magistrates to direct any person to abstain from any act to prevent a disturbance of the public tranquility, a riot or an affray.

Empress v. Tucker[22] it was held that even a religious assembly could be dispersed if there was danger to public peace.

It is common these days to use loudspeakers for various purposes. The police has power to put a check in their use in order to maintain public peace. In Masud Alam v. Commissioner of Police[23] where the authorities in charge of a mosque claimed that the Azan could not be heard by the faithful unless magnified mechanically, Sinha, J., of the Calcutta High Court negatived the contention and held that the religion did not make it obligatory to use loudspeakers. He said that it was not necessary for the religious practice of calling the faithful to prayer to use a loudspeaker. He even deprecated the practice of calling Azan through loud-speakers and observed that a prayer was actually a silent communion with the Creator, which needed no sound-emitting devices.[24]

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22. 7 Bom 42 (1882).

23. Masud Alam v. Commissioner of Police, AIR 1956 Cal 9.

24. Id., at 10. Supra p. 310-4.

To recapitulate, we find that the state in both the countries has the power to restrict religious freedom on grounds of public order. In India, however, the state has wider powers. Though the authorities may not prohibit in advance religious observances, they can do so if there is danger to public peace. In India, however, there are several statutory provisions which restrict religious freedom in the interest of public peace and order. Such statutory restrictions would probably be held unconstitutional in the United States.

Chapter XIII

Restrictions on Grounds of Public Morality.

Both religious order and legal order aim at maintaining and furthering moral standards of the community. Religious law, being mostly respected as a command of God, is absolute and strong, and is likely to have the most persuasive influence. The coercive order of the state may and sometimes does come into direct conflict with the commands of religion. Thus in some communities the religious order permits that a man may have more than one wife, while the legal order does not permit.[1] Some persons believe that the sacrifice of animals is a meritorious act, but it may well be that the laws of a particular country might prohibit it.[2] In India cruelty to animals is by law forbidden but the sacrifice of animals as a part of religious observance is not as a rule banned.[3-4]

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1. In the United States the practice of polygamy has been completely abolished through the efforts of the courts. In India legislation has abolished it in all communities except the Muslims. See *infra* pp.432-43.

2. Muslims observe Bakr-Id, a day of sacrifice each year when an animal is expected to be sacrificed by every Muslim. Some Hindus too believe in animal sacrifice. Recently it is reported that some goats were sacrificed in a three-day Srauta Soma Yagna, a Vedic worship of fire at Poona. Northern India Patrika, April 30, 1969, p.5.

3. See the Prevention of Cruelty to Animals Act, 1960 (Act 59 of 1960) repealing Act 11 of 1890.

4. Section 28 of the Act preserves the religious practices of a community in the following words :
   "Nothing contained in this Act shall render it an offence to kill any animal in a manner required by the religion of any community."

In some temples of the southern part of India there existed a system of dedicating a young girl to an idol as basavis or devadasis.[5] The belief that merit was gained by dedicating girls to temples was held by many pious Hindus. The notion that a devadasi should actually be allowed to marry a human being was abominable to religious sentiments of a certain section of Hindus quite as abominable as nuns being released from their vows and entering into human marriage. As could be imagined the practice led many devadasis to lead immoral life.[6] In order to curb the system of devasis section 372 of the Indian Penal Code in 1924[7] laid down that any

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5. One sessions judge in an old case traced the validity of such a system on religious grounds. See Queen Empress v. Basava, 15 Mad 75 (1891). A basavi or devadasi is a woman dedicated to the temple of goddess Yellamma (Universal Mother) worshipped in most Hindu homes in the South, particularly in North Mysore and adjoining areas of Maharashtra. Punkar, Dr. S.D., and Rao, Miss Kamla, A Study of Prostitution in Bombay, excerpts published in Northern India Patrika, August 12, 1968, p.10.

6. A devadasi is at liberty and is expected to have promiscuous intercourse with men generally. Gour, Hari Singh, The Penal Law of India, (1966, Law Publishers, Allahabad), III, p.1833.

7. The Indian Criminal Law (Amendment) Act, 1924 (Act 18 of 1924).

person dedicating a girl for the purpose was liable to punishment.[8-9] Even prior to this legislation the courts gave telling blows on the devadasi institution. In a case of 1891, _Queen Empress v. Basava_,[10] the Madras High Court ruled that the moment a person dedicated a girl as

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8. Prior to 1924, the section (section 372 of the Indian Penal Code) did not provide any punishment if she was not to be used for prostitution until she had attained the age of 16. See _Queen Empress v. Ramanna_, 12 Mad 273 (1889) and _Deputy Legal Remembrancer v. Karuna Baistobi_, 22 Cal 164 (1894). The amendment overrules this stand by providing punishment to cases in which it is intended or known that the girl is likely to be employed or used as prostitute "at any age". The section as amended by the 1924 Act runs as follows :

   "Whoever sells, lets to hire, or otherwise disposes of any person under the age of eighteen years with intent that such person shall _at any age_ be employed or used for the purpose of prostitution or illicit intercourse with any person or for any unlawful and immoral purpose, or knowing it to be likely that such person will at any age be employed or used for any such purpose, shall be punished."

9. In spite of this, the practice of dedicating the girls as devadasi is prevalent among certain backward communities. A recent study on prostitution in Bombay revealed that quite a large number of prostitutes in the red-light area of Kamathipura in Bombay are devadasis. It has even been suspected that devadasis are responsible in influencing non-devadasis to take to prostitution. See Punkar and Rao, _op. cit._ It may be noted that an attempt to expressly prohibit devadasi system failed in the Constituent Assembly as it was thought that 'though some relics of that system still exist', Madras, where this system prevailed had already prohibited it by a local law and it would 'disappear in course of time.' See speech of Shrimati G. Durgabai, _Constituent Assembly Debates_, VII, 808.

10. 15 Mad 75 (1891).

a basavi, he was to be deemed to have knowledge that the girl would lead an immoral life and as such was liable to punishment under section 372 of the Indian Penal Code. In that case the accused dedicated his daughter as a basavi by the performance of a marriage between her and a certain idol. The magistrate convicted the accused under section 373 but the Sessions Judge acquitted him. According to the Sessions Judge a basavi even though married to an idol was free to have intercourse with men generally. The children born of her were to be regarded as heirs to her father. In an earlier case,[11] where two minor girls were dedicated to act as dancing girls in a pagoda, the court applied section 372 of the Indian Penal Code and said :

> "(I)f the precepts of a particular religion enjoin acts which transgress the rules of Penal Law, these acts will clearly be offences."[12]

The Suppression of Immoral Traffic in Women and Girls Act[13-14] has made prostitution unlawful if it is

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11. Ex-parte Padmavati, 5 MHCR 415 (1870).

12. Id., at 417.

13. Act 104 of 1956.

14. The Act was impugned as unconstitutional as a restriction upon the trade of prostitution. But the same was upheld being a reasonable restriction in the interest of general public. See Smt. Shama Bai v. State of Uttar Pradesh, AIR 1959 All 57, 61-2, and The State of Uttar Pradesh v. Kaushailiya, AIR 1964 SC 416, 423.

being carried within 200 yards of any place of public worship or of certain other specified places.[15] Section 5 makes it an offence to procure, induce or take woman for the sake of prostitution. Under the terms of the section the institution of Devadasis could be an offence under the Act.

In India gambling is socially and religiously approved by a section of Hindus particularly during the Deevali festival. In numerous cases, it seems, the courts took a lenient view.[16-17] In one case the Allahabad High Court held that if a person simply allowed gamblers to use his house during a Deevali festival without an idea of demanding fee, he could not be punished for the offence of

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15. Section 7.

16. Section 3 of the Public Gambling Act, 1867 (Act 3 of 1867) provides punishment for the owner and occupier of the place which has been actually used as a common gaming house. Section 4 punishes all those persons who are found in any such place. Section 1 defines a 'Common gaming-house' as a house or place where instruments of gaming are kept or used "for the profit or gain of the person owning, occupying, using or keeping such house," whether by way of charge for the use of the instrument of gaming or of the house, or otherwise howsoever.

17. The general opinion has been that gambling on the day of Deewali or Deothan does not raise a presumption that it was for profit. See Lachman v. Emperor, AIR 1930 Oudh 403, Parmeswari Dayal v. Emperor, 1946 ALW (HC) 365.

keeping a common gambling house.[18] In an earlier case,[19] where several persons were found gambling in the house of a respectable Hindu on Deewali, the Court acquitted all of them as the owner or occupier had no idea of making a profit out of it. Recently, the Allahabad High Court said obiter that an offence of gambling could not be condoned on the plea that Hindu tradition permitted it on the Deewali day.[20] In the instant case, however, the Court had to set free all the accused as there was some technical defect in the search warrant.

In the United States, under the federal White Slave Traffic Act or the so called Mann Act,[21] it is a crime to transport in interstate commerce "any woman or girl for the purpose of prostitution or debauchery, or for any other immoral purpose." The purpose of the Act was to prevent or at least to minimise the movement in interstate commerce of women or girls for immoral purposes

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18. Jai Narain v. Emperor, AIR 1919 All 348. See also King Emperor v. Shankar Dayal, AIR 1922 Oudh 224 and Lachhman v. Emperor AIR 1930 Oudh 403.

19. Ram Shanker v. Emperor, AIR 1917 Oudh 102.

20. Mahabir Prasad v. State, 1956 All L J 935.

21. United States Code, Title 18, section 398, USCA, Sections 2421-2424.

and to suppress traffic in women and girls.[22] This Act was applied by the United States Supreme Court to a case of polygamy permitted by the religion of certain sects. Thus in Heber Kimball Cleveland v. United States of America,[23] a Mormon was convicted for travelling across state lines along with his several wives. The Supreme Court upheld the conviction under the Mann Act holding that the accused came within the penal provisions of the Act. The majority opinion delivered by Douglas, J., was that the words "for any other immoral purpose" must be deemed to include polygamy, a practice which had far more pervasive influence in society than the casual, isolated transgressions involved in prostitution and debauchery. The Court referred to the Mormons' cases on polygamy[24] and said :

> "The establishment or maintenance of polygamous households is a notorious example of promiscuity. The permanent advertisement of their existence is an example of the sharp repercussions which they

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22. Elmer Lee Wright v. United States of America, 175 F 2d 384, Cert. denied 338 US 873 (1949); United States v. Lewis, 110 F 2d 460 (1940), cert. denied Lewis v. United States, 310 US 634 (1940).

23. 329 US 14 (1946).

24. George Reynolds v. United States, 98 US 145, (1878), Samuel D. Davis v. H.G. Beason, 133 US 333 (1890), The Late Corporation of the Church of Jesus Christ of Latter Day Saints v. United States, 136 US 1 (1890).

> have in the community.... These polygamous practices have long been branded as immoral in the law. Though they have different ramifications, they are in the same genus as the other immoral practices covered by the Act."[25]

To the argument that the petitioners being already married with several wives could not be said to have transported their wives in interstate commerce for an 'immoral purpose', the Court replied that it led to the practice of polygamy and as such it was unlawful.

Murphy, J., in his forceful dissent was critical of this approach. According to him while the words "for any other immoral purpose" should be taken ejusdem generis to other purposes, viz., prostitution and debauchery, polygamy could not be equated with them. He remarked that simply because polygamy was branded as immoral in the United States, it could not be put in the same genus as prostitution and debauchery more so because several communities in non-Christian countries still recognised and practised it. He reasoned :

> "It was quite common among ancient civilizations and was referred to many times by the writers of the Old Testament; even today it is to be found frequently among certain pagan and non-Christian peoples of the world. We must recognise then that polygyny,

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25. Heber Kimball Cleveland v. United States of America, 329 US 14, 19 (1946).

> like other forms of marriage is basically a cultural institution rooted deeply in the religious beliefs and social mores of those societies in which it appears. It is equally true that the beliefs and mores of the dominant culture of the contemporary world condemn the practice as immoral and substitute monogamy in its place. To those beliefs and mores I subscribe, but that does not alter the fact that polygyny is a form of marriage built upon a set of social and moral principles. It must be recognized and treated as such."[26]

He took the view that polygamy did not come within the meaning of the expression "any other immoral purpose" in the Act.

To conclude, it seems that in both countries the position in this respect is the same. Whenever the state prohibits immoral practices, the religion has to give way to such state actions. After all both law and religion aim at the preservation of good morals. If this is so, there should not be any major conflict between them.

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26. *Id.*, at 26.

Chapter XIV

Restrictions on Grounds of Public Health.

The modern welfare state is concerned with the health of the community and to create conditions which would lead to physical well being of the people. But this purpose sometimes runs counter or conflicts with some religious convictions of the individual. The following are some of the spheres in which problems arise :

(a) Hunger strike, self-immolation or suicide.

(b) Prevention of infectious diseases.

(c) Saving of a man's life and health by administering medicines prohibited by his religion.

(a) Hunger strike, self-immolation or suicide.

Both in India and the United States the law forbids a person from committing suicide even if it is religiously motivated. The system of suttee that is the practice whereby widows burnt themselves on the pyre of their husbands, was common in the past. It was considered a virtuous act among the Hindus. The practice was, however, made an offence by law in 1829.[1] Under

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1. Originally, in 1812, the British Government acting under the pledge of neutrality (Judicial plan of 1772), which had provided that cases of religious usages were to be decided according to the laws of Muslims and Hindus) on the recommendations of the Hindu Pandits, forwarded by judges of the Nizamat Adalat, merely prohibited intoxication, drugging

the Indian Penal Code suicide is a crime for the person who attempts it[2] as also for those who abet it.[3] In a recent case,[4] where several persons were found guilty for inducing a widow to burn herself on the pyre of her husband, the Sessions Judge took a lenient view on the ground that the people of the locality believed it to be their religious duty to induce a widow to become suttee.

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and other means of inducing a widow to become a suttee against her will. In 1815 and 1817 orders were made that the district magistrate should send annual returns of the cases of suttee, relatives should give previous intimation of impending suttee to the Police, and that certain categories of widows were ineligible to become suttee. Suttee was, however, absolutely prohibited on December 4, 1829 by Regulation 17 of the Bengal Code. In Madras and Bombay also, a similar regulation was enforced on February 2, 1830. The regulation declared that persons assisting a voluntary sacrifice would be liable for culpable homicide and those using compulsion, for murder. See Majumdar, R.C., British Paramountcy and Indian Renaissance (1965, Bhartiya Vidya Bhawan, Bombay), X, 268-75.

2. Section 309.

3. Section 306 provides punishment for a term which may extend upto 10 years.

4. Tejsingh v. The State, AIR 1958 Raj 169 (DB).

But Wanchoo, C.J., speaking for the Rajasthan High Court, remarked :

> "The reasons he (the Sessions Judge) has given for this ridiculously lenient sentence are rather strange in the middle of the 20th century. He is still not sure whether the people are wrong or right in their adoration of Sati,... He seems to sympathise with the view of the people that it is their religious duty to help a woman who wants to become a Sati."[5]

The Court recorded its disapproval of the reasoning of the court below and enhanced the 6 months rigorous imprisonment to 3 years. The Court reasoned that the custom of suttee was forbidden more than 100 years ago by law. It was essential that people should respect the law. A light punishment of six months' imprisonment was ludicrous having regard to the barbarity of the act.[6] In the view of the Court it was necessary to impose deterrent punishment on persons who instigated or abetted it.[7] In some communities it is believed that if a person starves or tortures himself to death, he attains '*Nirvana*' or salvation by absorption in the Divine essence.[8] This too is an offence under the Indian Penal Code.

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5. *Id.*, at 172.
6. *Ibid.*
7. Heavy punishments have always been awarded for an abetment of *suttee*, see *Ramdial v. Emperor*, (AIR 1914 All 249), the sentence of 2 years was enhanced to 4 years, *Kindar Singh v. Emperor*, (AIR 1933 All 160), 3 years sentence was awarded, and *Emperor v. Vidyasagar Pande*, (AIR 1928 Pat 497), the maximum punishment of 10 years was awarded.
8. Gour, H.S., *Penal Law of India* (1966, Law Publishers, Allahabad), II, 1582.

In the United States also an attempt to commit suicide is an offence.[9] A person attemping suicide even though on religious considerations is liable to punishment. Speaking ironically, Waite, C.J., of the United States Supreme Court had questioned in 1878 in George Reynold v. United States:[10]

> "(I)f a wife religiously believed it was her duty to burn herself upon the funeral pile of her dead husband, would it be beyond the power of the civil government to prevent her carrying her belief into practice?"[11]

(b) Prevention of infectious diseases.

When a person is suffering from some infectious disease, preventive steps have to be taken in the interests of public health. It might become necessary to isolate the patient, compel him to take a particular type of treatment, or require those who come in contact with such patient to get themselves vaccinated. One cannot be allowed to hinder or take objection to such measures on religious grounds. Some cases have come before the courts

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9. Corpus Juris Secundum (1953, American Law Book Co., Brooklyn), 83, p. 783 s.3.

10. 98 US 145 (1878).

11. Id., at 166.

in the United States, and in all of them the duty of the authorities to prevent the spreading of such diseases has been stressed. Thus in *Henning Jacobson v. Commonwealth of Massachusetts*,[12] a state statute[13] empowered the state to compel the vaccination of all residents against small-pox in view of a threatened outbreak of an epidemic. Though the objection was not specifically raised on religious grounds, the United States Supreme Court declared in unequivocal terms :

> "Upon the principle of self-defence, of paramount necessity, a community has the right to protect itself against an epidemic or disease which threatens the safety of its members."[14]

Later, this case was relied upon by the Supreme Court to suggest that no one could be exempted on religious grounds from compulsory vaccination.[15]

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12. 197 US 11 (1905).

13. Massachusetts Revised Laws. Chap. 75 s.137.
Id., at 12.

14. *Id.*, at 27.

15. In *Sarah Prince v. Commonwealth of Massachusetts*, 321 US 158, 166 (1944), Rutledge, J., delivering the opinion of the Court remarked that one "cannot claim freedom from compulsory vaccination... on religious grounds." In *Arch R. Everson v. Board of Education of the Township of Ewing*, 330 US 1, 32, (1947), Rutledge, J., in his dissent, again said that the First Amendment "secures all forms of religious expression,... except conduct which trenches upon the like freedoms of others or clearly and presently endangers the community's good order and security."

In India sections 269 and 270 of the Indian Penal Code, and the Epidemic Diseases Act, 1897[16] are relevant. Section 269 of the Indian Penal Code provides for punishment if a person unlawfully or negligently acts by which he is likely to spread the infection of any disease dangerous to life. Section 270 of the Indian Penal Code punishes the person if he malignantly spreads the disease. The Epidemic Diseases Act, 1897, lays down rules for taking special measures to control the spreading of dangerous epidemic diseases. If the state governments are satisfied that the ordinary provisions of law are not sufficient, they are authorised to take special measures and prescribe rules to prevent the outbreak and spreading of such diseases.[17] In J. Choudhury v. The State[18] the appellant, a practising homoeopathic doctor, was convicted for refusing to get himself inoculated against cholera in violation of a regulation made by the state Government under powers conferred by the Epidemic Diseases Act. He contended that 'he had a conscientious objection against inoculation and that he had taken sufficient preventive homoeopathic medicine to protect

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16. Act 3 of 1897.

17. Section 2.

18. AIR 1963 Orissa 216.

himself against an attack of cholera.'[19] He stated further that 'he was of the view that inoculation was dangerous to human health and that inoculation would create reaction on the human body which might endanger human life.'[20] All these contentions were brushed aside by the Orissa High Court. Without entering into the points raised by the appellant, Narasimham, C.J., simply pointed out that since the appellant admited his guilt and that since he could not prove that the taking of homoeopathic medicine was similar to inoculation he could be convicted for his refusal.

Recently, in the United States, a new problem has been raised by some Christian scientists who have asserted that the fluoridation of water by way of medication is forbidden by the tenets of their church. This question cropped up in a number of cases[21] before the state courts

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19. *Id.*, at 217. Emphasis added.

20. *Ibid.*

21. *De Aryan* v. *Butler*, 119 Cal App 2d 674 (1953) cert. denied 347 US 1012, *Marks E. Chapman* v. *City of Shreveport*, 225 La 859 (1953), appeal dismissed 348 US 892, *Kraus* v. *Cleveland* 121 NE 2d 311 (1954), *Kaul* v. *Chehalis*, 45 Wash 2d 616 (1954), *Froncek* v. *Milwaukee*, 69 NW 2d 242 (1955) - all cases annotated at 43 ALR 2d 459-64 and *Martin L. Dowell* v. *City of Tulsa*, 43 ALR 2d 445, cert. denied 348 US 912 (1954).

and in the majority of them[22] the power of the state to fluoride the water in the interest of the health of the general public was upheld. In Martin L. Dowell v. City of Tulsa,[23] the Oklahoma Supreme Court assuming that medical treatment might be forbidden by the tenets of some religious sects rejected the objection and held that it was regulatory measure for health purposes and as such there was no violation of the free exercise of religion. The Court observed :

> "(I)n the contemplated water fluoridation, the City of Tulsa is no more practising medicine,.... than a mother would be who furnishes her children a well balanced diet, including food containing vitamin D and calcium to harden bones and prevent rickets, or lean meat and milk to prevent pellagra. No one would contend that this is practicing medicine or administering drugs."[24]

(c) Saving a man's life and health by administering medicines prohibited by his religion.

A perplexing problem might arise where a person is administered medicine against his religious convictions and later he brings an action against the authorities on the ground that his religious liberty had been violated. But as a matter of law medicines are administered or surgical

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22. A contrary opinion was, however, taken in McGurren v. Fargo, 66 NW 2d 207, annot. 43 ALR 2d 465 (1954).

23. 43 ALR 2d 445 (1954) .

24. Id., at 452.

operations are performed on a person only with his consent. In case he is unconscious or otherwise incompetent to give his consent, the consent is taken from the person in charge of him or from his guardian. Where it is not possible to obtain consent and there is an imminent danger to life the surgeons take up the case either without such consent or with the permission of a court.[25] The courts have power to order compulsory medical treatment for any serious illness or injury.[26] Since an attempt to suicide is an offence both in India and in the United States, one cannot be allowed to take the risk of his life as also that of the life of any other person in his charge on grounds of religious susceptibilities.

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25. It is doubtful that in cases where consent is asked for, but refused, a person is legally competent to administer any medicine prohibited by the patient's religion. Section 92 of the Indian Penal Code merely exempts those cases where consent is not obtained due to the fact that in the circumstances it could not be taken. This section would not apply if consent is refused.

26. The courts of the District of Columbia issued orders both for necessary surgery, (e.g., In re Two year Old Girl, DC Juv Ct. No.44-753-J, January 23, 1964), and for necessary blood transfusion refused on religious grounds, (e.g., In re One and a Half months Old Girl, DC Juv Ct No.41-633-J, June 6, 1963; In re Two Day Old Infant, DC Juv Ct, No. 37-25-OJ, June 24, 1962. These cases are referred to In re Application of the President and Directors of Georgetown College, 331 F 2d 1000, 1007-8, fn. 15 (D. Columbia).

In *Darrell Labrenz v. Illinois ex rel. Wallace*[27] the life of a child was in danger as it was born with an RH-negative factor inherited from her mother - a disease which causes baby's red blood cells to destroy each other. The medical doctors advised transfusion of blood in order to save the child's life. The parents who were 'Jehovah's Witnesses' objected as they believed that transfusion was equivalent to eating or drinking of human blood something forbidden by the Bible. The matter was brought before the Court by the hospital authorities. The Court took away the child from the parent's guardianship and gave it to another person who was appointed to be the guardian of the child. This guardian consented and on such consent blood was transfused and the child was saved. Later the temporary guardianship was terminated and the child was given back to her parents. The parents petitioned the Supreme Court of Illinois against the action of the local Court. This Court confirmed the lower Court's decision. The United States Supreme Court also refused to interfere in the matter.

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27. 411 Ill, 618, 104 NE 2d 769. Cert. denied 344 US 824 (1952) discussed in Pfeffer, Leo, *Church, State and Freedom* (1953, Beacon Press, Boston), p.575. See other blood transfusion cases *In re Application of the President and Directors of Georgetown College*, 331 F 2d 1000, (D.Columbia), Cert. denied 377 US 978 (1964), *United States v. George*, 239 F Supp 752, (D. Connecticut, 1965).

In India also some people on religious grounds refuse to take certain types of medicine. In such cases, the patients are seldom compelled to take the medicine. But in case the life of the patient is in danger there would be nothing illegal if he were compelled to take treatment without obtaining his consent.

Thus we find that so far as the restrictions on grounds of public health are concerned, there is little difference between the laws of the two countries. The state is under a duty to look after the welfare of its subjects. Such measures which are taken to safeguard the health of the citizens can be fully justified even though they might be against certain religious prejudices or beliefs.

Chapter XV

Religious Freedom and Other Fundamental Rights

Owing to the complexity of social relations rights founded on one set of relations may conflict with rights founded on other relations. To determine what is finally a superior right involves a balancing of different claims. This balancing is effected to a form or way of life accepted in a given society, and in given conditions. Some rights may be considered as more fundamental than others. Thus in certain places of historical development, religious duties were considered paramount, overriding all others. Different countries had different outlook in these matters. Accordingly, provisions in respect of religious freedom are not identical in India and the United States. In India, article 25(1) of the Constitution guarantees religious freedom subject to other fundamental rights of the third part of the Constitution. This necessitates a balancing of rights in the sphere of religion with other rights. The fact that article 25(1) may give way to other fundamental rights has led the Supreme Court, in _Sri Venkataramana Devaru v. State of Mysore_[1] to hold that even clause (2)[2] of that

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1. AIR 1958 SC 255.

2. "(1) Subject to public order, morality and health and to the _other provisions of this Part_, all persons are equally entitled to freedom of conscience and the right freely to profess, practise and propagate religion.

article supersedes clause (1) because of the reservation mentioned in clause (1) in favour of other fundamental rights. In the instant case the impugned Act[3] had authorised the entry of untouchables in Hindu temples. The temple in question belonged to the Gowda Saraswath Brahmin community. Apprehending that this temple might be opened for the excluded class of persons, the trustees of the temple challenged the Act on the ground that under article 26(b) a religious denomination has a right to manage its own affairs in matters of religion. The regulation of entry into a temple being "a matter of religion," the appellants claimed that the state could not under article 25(2)(b) throw open their temples to the general public. They contended that as article 25(1) was subject to other fundamental rights the reservation in article 25(2)(b), whereby temples would be thrown open to all Hindus was

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(2) Nothing in this article shall affect the operation of any existing law or prevent the State from making any law -

(a) regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice;

(b) providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus."

Article 25 of the Constitution of India.

3. The Madras Temple Entry Authorisation Act, 1947 (Mad. Act 5 of 1947).

also subject to article 26(b). It meant that the provision in the article relating to the throwing open of public institutions to all classes of Hindus was subject to article 26(b). But Aiyer, J., delivering the judgment of the Supreme Court observed that the provisions of article 26(b) were to be read in the light of limitations laid down in article 25(2)(b). As to the relationship of clauses (1) and (2) of article 25, he said that the one of the provisions, to which the right declared in article 25(1) was subject, was article 25(2). In his own words :

> "The limitation "subject to the other provisions of this part" occurs only in Cl.(1) of Article 25 and not in cl. (2). Clause (1) declares the rights of all persons to freedom of conscience and the right freely to profess, practise and propagate religion. It is this right that is subject to the other provisions in the Fundamental Rights Chapter. One of the provisions to which the right declared in Art. 25(1) is subject is Art. 25(2). A law, therefore, which falls within Art. 25(2)(b) will control the right conferred by Art. 25(1), and the limitation in Art. 25(1) does not apply to that law."[4]

This reasoning of Aiyer, J., it is submitted, was not correct. Though there is no doubt that clause (2) governs clause (1) of article 25, there was no need for the Court to invoke the general qualifying phrase in clause (1) when clause (2) itself said that nothing in article 25 should affect any law made by the state in respect of any matter

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4. Sri Venkataramana Devaru v. State of Mysore, AIR 1958 SC 255, 267.

referred to in that clause.[5]

In the United States, the rule is different. The Constitution does not contain any provision for these matters. The courts are free to judge the circumstances in each case and decide according to their wisdom keeping in view the social, moral and ethical standards of society. Some of the fields in which conflicts as to relative importance of a religious right over other rights might arise are dealt below :

(a) Religious Freedom and Property Rights.

In India, article 19 guarantees the right to hold and enjoy[6] property subject to reasonable restric-

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5. In several cases, while interpreting Art. 19, it has been admitted that clauses 2 to 6 of that article govern cl.(1). See e.g., Babulal Parate v. The State of Maharashtra, AIR 1961 SC 884, 890. In the same manner when cl.(2) of Art. 28 exempts the operation of Art. 25 in certain circumstances mentioned therein, it must be deemed that it is actually cl.(2) of Art. 25 which governs cl.(1) and not the opening words of Cl.(1) which governs only other provisions of the 3rd part of the Constitution dealing with fundamental rights. For a critical approach see, Subramanian, N.A., Freedom of Religion, 3 JILI 323, 329 (1961).

6. Sections 378 to 462 Indian Penal Code, sections 133, and 144 to 153 Code of Criminal Procedure, 1898 (Act V of 1898) and the Cattle Trespass Act, 1871 (Act 1 of 1871) etc. make provision for quiet enjoyment.

tions.[7] Article 31 further provides that the state cannot compulsorily acquire a property except for public purpose. As article 25 guaranteeing religious freedom is subject to other provisions of Part III, it may be summarised that in the case of a conflict between freedom of religion and the right of property the former would have to give way to the latter.

In Raja Suryapal Singh v. The Uttar Pradesh Government,[8] a Zamindari abolition case, it was argued that in the case of an acquisition of the properties of religious endowments the right of a matawalli under article 26 to profess his religion would be infringed if waqf property were compulsorily acquired. Further, the religious endowments themselves being meant for a public purpose, their property could not be acquired for another public purpose. But both these contentions were repelled by the Court. As to the former argument the full bench of the Allahabad High Court held that the acquisition of such a property has

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7. The article says :
"19(1) All citizens shall have the right...
(e) to reside and settle in any part of the territory of India;
(f) to acquire, hold and dispose of property;.
(5) Nothing in sub-clauses...(e) and (f) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, reasonable restrictions on the exercise of any of the rights conferred by the said sub-clauses either in the interest of the general public or for the protection of the interest of any Scheduled Tribe."

nothing to do with the mutawalli's right of profession, particularly when "the right conferred by Art. 25 (was) expressly subject" to article 31.[9] The Supreme Court also while approving the opinion of the High Court observed :

> "A Charity created by a private individual is not immune from the sovereign's power to compulsorily acquire that property for public purposes."[10]

In other cases also properties of religious institutions have been compulsorily acquired.[11]

As stated above, a citizen's right to hold property is subject to reasonable restrictions. The courts have held that the term 'property' in article 19(1)(f) has a wide connotation as to include even abstract rights such as the rights of the head of a religious institution.[12] In

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9. *Id.*, at 690.

10. *The State of Bihar v. Sir Kameshwar Singh*, AIR 1952 SC 252, 313 (per Mahajan, J.).

11. See e.g., AL. Ct. *Alagappa Chettiar v. Revenue Divisional Officer, Chidambaram*, AIR 1969 Mad 183.

12. It may, however, be noted that mutwallis and managers of religious institutions are treated on separate footings as they are held not to possess any proprietary interest in the Wakf or other religious properties. See *Nawab Zain Yar Jung v. Director of Endowments*, AIR 1963 SC 985 (mutawalli has no interest in the property of the wakf), *Tilkayat Shri Govindlalji Maharaj v. State of Rajasthan*, AIR 1963 SC 1638 (Tilkait of Nathdwara temple is a mere manager having no proprietary interest).

Commissioner Hindu Religious Endowments, Madras v. Sri Lakshmindra Tirtha Swamiar of Sri Shirur Mutt,[13] the Mahant of a Hindu religious institution challenged the validity of an enactment[14] which had curtailed his proprietary interest in the property of the institution by requiring him to take permission of state officials before dealing with certain types of properties and their incomes. The Supreme Court held that the restrictions imposed on his rights were unreasonable. The Court was of the opinion that,

> "the ingredients of both office and property, of duties and personal interest are blended together in the rights of a Mahant and the Mahant has the right to enjoy this property or beneficial interest so long as he is entitled to hold his office. To take away this beneficial interest and leave him merely to the discharge of his duties would be to destroy his character as a Mahant altogether."[15]

It may be noted that in this case there was a conflict between articles 26 and 19. The authorities had sought to regulate the working of religious institutions under

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13. AIR 1954 SC 282.

14. Madras Hindu Religious and Charitable Endowments Act, 1951 (Madras Act 19 of 1951).

15. Id., at 288-9.

article 26(d).[16] On the other hand the Mahant asserted his proprietary rights within the terms of article 19(1)(f). If there would have been any conflict between articles 25 and 19, the former could have been required to give way to the latter.

As a general rule in the United States also the same principles apply and proprietary rights are preferred over religious rights. In a number of cases the problem of holding religious discourses on the property of a private individual arose. In certain circumstances if the owners or occupiers of the premises do not object one may enter on the premises under their control for the holding of religious discourses or for the distribution of religious literature. In _Watchtower Bible and Tract Society v. Metropolitan Life Insurance Company_,[17] the Insurance company, which was the owner of a large housing project, prohibited the solicitation of donations or distribution of handbills in any of the apartment buildings

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16. "Subject to public order, morality and health, every religious denomination or any section thereof shall have the right... (c) to own and acquire movable and immovable property; and (d) to administer such property in accordance with law."
Article 26(c) & (d).

17. 3 ALR 2d 1423 (1948, NY).

tenanted by about 35,000 persons. The New York Supreme Court refused to interfere with the ban imposed by the owner on the ground that no one had a fundamental right under the First Amendment to solicit people for his religious beliefs against an unwilling house owner. Every owner had a liberty to forbid solicitation and that right was protected by law. The United States Supreme Court refused to issue a writ of certiorari to the New York Supreme Court.[18]

In an earlier case, _Grace Marsh v. State of Alabama_,[19] however, where the facts were more or less the same except that the propagation was prohibited in the streets of a company owned town, the United States Supreme Court had taken a different view. In that case the state of Alabama enacted a law making it a crime to enter or remain on the private premises after being warned by the owner not to do so. An industrial company, having established a town for its employees prohibited all solicitation without permission of the town authorities.[20] A Jehovah's Witness

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18. _Watchtower Bible and Tract Society v. Metropolitan Life Insurance Company_, 335 US 886 (1948).

19. 326 US 501 (1946).

20. The prohibition was posted in store windows as follows :

"This Is Private Property, and Without Written Permission, no Street, or House Vendor, Agent or Solicitation of Any Kind Will Be permitted."

_Id._, at 503.

was convicted by the state Court for distributing religious literature in violation of the rule. On appeal, the United States Supreme Court reversed the judgment of the state Court and held that the rule which permitted the dissemination of religious literature in public streets, should apply also in the privately owned streets of a company-town. The Court noted that a large number of persons in the United States lived in company-owned towns. They were all free citizens and they were to be allowed to get such general information as any other citizen was entitled to get, if living in any other town owned by the state. The Court observed :

> "When we balance the constitutional rights of owners of property against those of the people to enjoy freedom of press and religion, as we must here, we remain mindful of the fact that the latter occupy a preferred position."[21]

It is worth noting that the stand taken by the American Supreme Court in this case might be regarded as opposed to the provisions of the Constitution in India. It is submitted that in India the right to religious freedom may have to give way to the right of property. The reasoning in _Grace Marsh_ v. _State of Alabama_[22] also runs counter to that adopted in the subsequent case of _Watchtower Bible_,[23] noted above in which the action of the

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21. _Id._, at 509.
22. 326 US 501 (1946).
23. _Watchtower Bible and Tract Society_ v. _Metropolitan Life Insurance Company_, 338 US 886(1948), _supra_ n.17.

Insurance company prohibiting solicitation of about 35,000 residents living in its houses was uphold. The New York Supreme Court, however, distinguished the Watchtower Bible case[24] from Grace Marsh v. State of Alabama[25] on the ground that in the former case the property owner had prohibited solicitation of donations and distribution of handbills inside the building, in the latter it was forbidden on the streets and side-walks of the company-owned town. The Court cited in its judgment the opinion of the United States Supreme Court in Frank Hague v. Committee for Industrial Organization[26] to the effect that for discussion of questions of public importance, streets and parks are always open irrespective of the question of ownership of such parks.[27] It is, however, a different matter when such discussion is sought to take place inside a building even though it might be divided in apartments. But it is submitted that a building in which such a large number of people live might technically remain a private property, but still it is like a small township. In such circumstances the reasoning of Grace Marsh v. State of Alabama[28] could well be applied.

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24. Ibid.
25. 326 US 501 (1946), supra n. 19.
26. 307 US 496 (1939).
27. Id., at 515, cited in Watchtower Bible and Tract Society v. Metropolitan Life Insurance Company, 3 ALR 2d, 1423, 1430 (1948, NY).
28. 326 US 501 (1946).

In another case,[29] it was held that right to property might override religious freedom. However, an occupier of a premises cannot altogether avoid religious solicitation as persons would often approach them seeking their permission to hold religious meetings on their premises. He may refuse, but still he will have to answer doorbell calls of unsolicited handbill distributors. The Jehovah's Witnesses believe that it is their duty to propagate their religion. It is held by many that if this causes annoyance, it should be tolerated and that the 'Witnesses' should not be penalised or prohibited. Indeed, in Thelma Martin v. City of Struthers, Ohio[30] the Jehovah's Witnesses were acquitted of the charge of creating nuisance by ringing doorbells with the only object of distributing religious literature.

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29. Dan Leroy Hall v. Commonwealth of Virginia, 335 US 875 (1948). A review of the judgment of Virginia Supreme Court was refused by the United States Supreme Court.

30. 319 US 105 (1943). It may, however, be noted that the property rights give way to religious solicitation only. If there is solicitation for subscriptions to other purposes the prohibition of such solicitation will be valid. See Beard v. City of Alexandria, 341 US 622 (1951).

(b) Right to Trade and Prohibition of Slaughter of Animals.

One of the directive principles of the Indian Constitution is aimed at the organization of agriculture and animal husbandry on modern and scientific lines, preservation and improvement of the breeds of cattle, and prohibition of the slaughter of cows and calves and other milch and draught cattle.[31] Pursuant to these directives certain states have enacted legislation banning the slaughter of cows and certain other animals.[32] Some of these enactments were challenged before the Supreme Court[33] on the ground that they violated the right of the petitioners to carry on trade or businesses guaranteed by the Constitution.[34]

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31. Article 48 of the Constitution of India.

32. E.g., the Bihar Preservation and Improvement of Animal Act, 1956(Bihar Act 2 of 1956); the Uttar Pradesh Prevention of Cow Slaughter Act, 1955(U.P. Act 1 of 1956); the Central Province and Berar Animal Preservation Act, 1949 (C.P. & Berar Act 52 of 1949) as amended by Madhya Pradesh Acts 23 of 1951 and 10 of 1956; the Bombay Animal Preservation Act, 1948 (Bombay Act 81 of 1948).

33. Mohammed Hanif Quareshi v. State of Bihar, AIR 1958 SC 731, Abdul Hakim Qureishi v. State of Bihar, AIR 1961 SC 448, and Mohammed Faruk v. State of Madhya Pradesh, Writ Petition no. 60 of 1968, decided on April 1, 1969, AIR 1960 NSC 14, The Statesman, April 3, 1969, p.6.

34. "All citizens shall have the right ...
   (g) to practise any profession, or to carry on any occupation, trade or business.

   "Nothing in sub-clause (g) ... shall affect the operation of any existing law in so far it imposes, or prevent the State from making any law imposing, in the interests of the general public, reasonable restrictions on the exercise of the right conferred by the said sub-clause..."

   Clauses (1)(g) and (6) of article 19 of the Constitution of India.

It may be noted that the provision for the prohibition of cow-slaughter was made in article 48 mainly out of respect to the sentiments of the majority community, namely the Hindus. The Hindus as is well known have great reverence for the cow[35] and the very idea of slaughtering them for food purposes is repugnant to their way of thinking. The prohibition of cow-slaughter in article 48 has led some even to hold the opinion that Hindu sentiments predominate in the Constitution.[36]

The first case that arose before the Supreme Court on the validity of the enactments prohibiting cow-slaughter was _Mohammad Hanif Quareshi v. State of Bihar_.[37] In that case Bihar, Uttar Pradesh and Madhya Pradesh statutes were challenged. The Bihar Act placed a total ban on slaughter of all types of animals of the species of bovine cattle. Similarly the Uttar Pradesh Act put a total ban on cow-slaughter. Similar provisions were contained in the Madhya Pradesh statute. While the Uttar Pradesh Act did not restrict the slaughter of buffaloes, the Madhya Pradesh Act allowed such slaughter under a certificate issued by certain autho-

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35. It may be noted that Nepal, when declared itself a Hindu state (article 3(1) of the Constitution of Nepal, 1962), also declared cow the national animal(article 6'2').

36. See e.g., Austin, Granville, _The Indian Constitution: Cornerstone of a Nation_, (1966, Clarendon Press, Oxford), p. 82.

37. AIR 1958 SC 731.

rities mentioned in the Act. The petitioners pleaded that they were carrying on the business of a butcher and if they were not allowed to slaughter the animals prohibited by the statutes, they would have to close their business. They also claimed that the prohibition was not a reasonable restriction in the interest of the general public. The Court discussed at great length the reasonableness of the restrictions and of the fact whether they were in the interest of the general public. It traced the history of the sanctity of the cows in Hindu society and cited Hindu scriptures in support of such belief. Originally animal[38] sacrifice was practised. Later the feeling of compassion grew up among the Hindus. Giving arguments for this change the Court reasoned that in the distant past, the climate was extremely cold and the Vedic Aryans had been a pastoral people before they settled down as agriculturists.[39] In agriculture the usefulness of the cow and bull was felt and since then they came to acquire a special sanctity. High praises were bestowed specially

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38. The animals included, goats, sheeps, cows, buffaloes and horses. Id., at 744. This list was collected by the Court from Rig Veda (VIII. 43, 11), Satpatha Brahmana (III, 4, 1-2) and Yagnavalkya (vaj. 1, 109).

39. Ibid.

on the cows in the verses of the Vedas.[40] At present, the Court found,

> "the Hindus in general hold the cow in great reverence and the idea of the slaughter of cows for food is repugnant to their notions."[41]

The Court was of the opinion that though a constitutional question could not be decided on grounds of mere sentiments, it might be taken into consideration as one of the elements in judging the reasonableness of the restrictions. In the words of the Court :

> "While we agree that the constitutional question before us cannot be decided on grounds of mere sentiment, however passionate it may be, we, nevertheless, think that it has to be taken into consideration, though only as one of many elements, in arriving at a judicial verdict as to the reasonableness of the restrictions."[42]

The Court took into account the economic factors involved in the matter of slaughter of animals. Quoting facts and figures, the Court remarked that although cattle wealth in India was the highest in the world, yet the milk production was perhaps the lowest. Summarising the utility of the cow and her progeny the Court said:

> "They sustain the health of the nation by giving them the life giving milk which is so essential an item in

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40. "The slaughter of an innocent, O Kritya, is an awful deed, Slay not cow, horse, or man of ours."
Atharva Veda, X, 1, 29.
The cow is Heaven, the cow is Earth, the cow is Vishnu, Lord of life.
The Sadhyas and the Vasus have drunk the out pouring of the cow. Both Gods and moral men depend for life and being on the cow.
She hath become this universe; all that the sun surveys is she."
Atharva Veda, X, 10, 30.
Id., at 745.

> a scientifically balanced diet. The working bullocks are indespensable for our agriculture, for they supply power more than any other animal. Good breeding bulls necessary to improve the breed so that the quality and stamina of the future cows and working bullocks may increase and the production of food and milk may improve and be in abundance. The dung of the animal is cheaper than the artificial mannures and is extremely useful. In short, the back-bone of Indian agriculture is in a manner of speaking the cow and her progeny."[43]

The Court, then posed other questions: How could the health and nourishment of the cattle population be maintained? Could the butchers be helped from dislocation of their business? How could an alternative nourishment be provided to *Muslims, Christians, persons of Scheduled Caste and Tribes* and other poor people, whose staple food was beef and buffalo flesh? The Court found that as the country was in short supply of milch cattle, breeding bulls and working bullocks, the cattle population fit for these purposes should be properly fed and whatever cattle food was available should be used for the maintenance of useful cattle. In the opinion of the Court a total ban on slaughter of cattle, useful or otherwise might cause a serious dislocation of the business of butchers and hide merchants without any compensatory benefit.[44] A large section of the people would be deprived of their staple food. The keeping of useless cattle would not

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43. Id., at 748.

44. The Court referred to its earlier opinion in this respect held in Saghir Ahmad v. State of Uttar Pradesh, AIR 1954 SC 728, 739.

be economically sound. Moreover, they would consume a good part of the cattle food, deteriorate the breed and eventually affect the production of milk, breeding bulls and working bullocks.

In order to arrive at a correct conclusion the Court classified all the cattle into three heads - (i) the cows of all ages and calves of cows and calves of she-buffaloes, male and female; (ii) she-buffaloes, breeding bulls and working bullocks so long they are milch or draught cattle; and (iii) she-buffaloes, bulls and bullocks after they have ceased of their utility. As to the cattle comprised in groups (i) and (ii) the Court held that total ban of their slaughter was necessary, but as to (iii) their slaughter need not be prohibited. The basis of the distinction between cattle of groups (i) and (ii) was that while the cattle owners would give preference in providing food to she-buffaloes, breeding bulls and working bullocks, they might not take that much of care of the cattle falling in the first group of whom they would not expect adequate return. Consequently, the cattle owners would themselves not allow the cattle of the second group to be killed so long they are of use. But they might prefer to get rid of the cattle of the first group and sell them away even under false pretenses particularly when they would give less milk and in consequence become financially a burden on their owner. Due to paucity of space in big towns, uneconomic cows might be sold away to

butchers so that they might get rid of them; and purchase in their place cattle capable of giving more milk. The Court, therefore, concluded that the cattle falling in the first group needed more protection and their slaughter should be totally banned. But other cattle might be allowed to be slaughtered after they became useless to their owners.

It may be noted that the slaughter of cows falling in the first group could be totally banned. In arriving at this conclusion, the Supreme Court took into account, among others, two main factors. First, the sentiments of the Hindus that they hold the cow in great reverence and the idea of the slaughter of cows for food being repugnant to their notion.[45] Second, even if drastic and stringent regulations are imposed on the slaughter of useless cows, experience shows that they are not sufficient to protect even the useful cows.[46]

Consequent to the invalidation of certain provisions of the statutes relating to total prohibition of the slaughter of she-buffaloes, bulls and bullocks,[47] the states of Bihar, Uttar Pradesh and Madhya Pradesh enacted amending legislations to prescribe the age of certain cattle at which

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45. Id., at 745.

46. Id., at 755.

47. Mohammad Hanif Quareshi v. State of Bihar, AIR 1958 SC 731.

they could be presumed to be incapable of being used as milch or drought cattle and could be slaughtered. While the Bihar legislation put this age at 25,[48] Uttar Pradesh and Madhya Pradesh put it at 20.[49] In Abdul Hakim Quraishi v. State of Bihar,[50] the petitioners contended that by fixing the age of 20 or 25 at which cattle could be slaughtered, while their natural age was about 15 years, the state had virtually prohibited their slaughter. This was, therefore, an arbitrary and unreasonable restriction which was not in the interest of general public. After citing various authorities in support of the view that the average age of the cattle was about 15 years, the Court, referring to its earlier opinion in Mohammad Hanif Quareshi v. State of Bihar,[51] declared the amending legislations invalid to the extent it required the slaughter of animals only at a prescribed age regardless of the fact that such cattle might become useless and incapable for milch and draught purposes much before reaching such a high age.

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48. The Bihar Preservation of Animals (Amendment) Act, 1959, section 3.

49. The Uttar Pradesh Prevention of Cow Slaughter(Amendment) Act, 1958, section 3(3)(a); and the Madhya Pradesh Agricultural Cattle Preservation Act, 1959 (M.P. Act 18 of 1959), section 4(2)(a).

50. AIR 1961 SC 448.

51. AIR 1958 SC 731.

Recently in another unreported case, Mohammad Faruk v. State of Madhya Pradesh,[52] the Governor issued a notification under the Madhya Pradesh Municipal Corporation Act prohibiting the slaughter of bulls and bullocks within certain municipal limits. The petitioner, who was carrying on the business of slaughtering these animals challenged the notification as it affected his constitutional right to carry on his trade or occupation. He claimed that the slaughtering of animals was his hereditary occupation. He further pleaded that as the prohibition was made just out of respect for the sentiments of a certain section of the people, it was not a reasonable restriction in the interest of general public. Accepting this plea the Court held the notification invalid as being an unreasonable restriction on the freedom of trade. The Court referred to its earlier decision in Mohammad Hanif Quareshi v. State of Bihar[53] that there could not be a total prohibition on bulls and bullocks but it appears that it did not accept the reasoning of the earlier case that sentiments should be taken into

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52. Writ Petition no.60 of 1968, decided, April 1, 1969 by the Supreme Court of India, AIR 1969 NSC 14, The Statesman, April 3, 1969, p.6.

53. AIR 1958 SC 731.

consideration "as one of many elements, in arriving at a judicial verdict as to the reasonableness of the restriction."[54] Instead the Court took the view that the prohibition could not be upheld if it was imposed not in the interest of the general public, but merely to respect the sentiments of a section of people.

The reasoning given for decisions in cow-slaughter cases are open to criticism. As stated earlier,[55] it is a fact that the Hindus have great reverence for the cow. The prohibition of cow slaughter under the directive principle contained in article 48 was based mainly because of the sentiments held by the majority community, namely the Hindus. The guarantee to the minorities under article 29(1) of the Constitution to conserve their culture, raises the question: Has the majority also a right to conserve its own culture? And what is this culture? Does it not include the respect and reverence for the cow? Is it not a fact that Hindus feel strongly about cow-slaughter as something against their religion? Though the British government in India did not prohibit slaughter of cows altogether, nevertheless it permitted slaughter in private, presumably because of strong feelings of Hindus. The majority community has also an equal right to conserve their religion and

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54. Id., at 745, supra p.366.

55. Supra pp. 365-6.

culture. The Court itself conceded that Hindu tradition holds cows as sacred. This appears to be the background of the directive principle in article 48. It seems that the Supreme Court, in Quareshi case[56] did not take into account this aspect of the matter. It was correct, no doubt, when it repelled the contention of the state that laws made to discharge the obligation imposed on it by the directive principles should at least be treated at par with the fundamental rights. But it is submitted, that in judging the reasonableness of restrictions on trade directive principles should have been considered as an important guide. Moreover, the Court's classification of certain cattle in three groups was artificial and reasons given were not convincing. Had the Court considered the directive principle of article 48 it might have classified cattle in other categories and found some reasonableness and the public interest in the directive principle itself. The Court was alive to the fact that no abstract standard could be fixed to determine whether a certain measure was reasonable and in the interest of the

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56. Mohammad Hanif Quareshi v. State of Bihar, AIR 1958 SC 731.

general public.[57] Yet the Court did not refer to article 48 while testing the reasonableness of the restriction. It merely observed that sentiments of a class of persons might be taken as one of several factors in considering the reasonableness of the restriction. In the subsequent unreported case, Mohammad Faruk v. State of Madhya Pradesh,[58] the Court, it seems, brushed aside the ground of sentiment in deciding the question of reasonableness. This time the Court took mainly the economic aspect of the prohibition of slaughter of various cattle and decided the case on that basis. The distinction made between a cow, and she-buffaloes, bulls and bullocks in Mohammad Hanif Quareshi v. State of Bihar[59] are from economic point of view artificial and do not carry conviction. In the case of prohibition of cows, the Court has taken the view that the restrictions are reasonable. But in the case of other cattle a contrary view has been taken and the restrictions have been held unreasonable. According to the Court due to paucity of space in some big towns like Bombay, people usually allow even milch cows to be sold to the butchers just to purchase a new one having the capacity of giving more milk. The Court had also found

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57. The Court quoted with approval the observations of Patanjali Sastri, J., in State of Madras v. V.G.Row, AIR 1952 SC 196, 200 to that effect.

58. Decided, April 1, 1969. AIR 1969 SC 14. The Statesman, April 3, 1969, p.6.

59. AIR 1958 SC 731.

that the considerations which applied to she-buffaloes, bulls and bullocks that when they became useless, they would be sold to butchers did not apply to cows. It seems, therefore, that if the Court could be assured that even in the case of cows affective rules could be made by which only useless and inefficient cows were slaughtered, it might not have found in favour of a total ban of even cow-slaughter. The reasoning behind the classification does not seem to be sound. How many people in India live in big towns like Bombay where there is a shortage of space? And even in such towns how many can afford to maintain goshalas for cows or she-buffaloes? A large number of these cattle are reared in the country side. The argument based on the paucity of space does not seem to be sound. If that is so the classification made by the Court falls to ground and from a mere economic point of view total prohibition of cow-slaughter cannot be sustained.

The submission is that the reasonableness of the statute affecting the butcher's trade or occupation should have been judged in the light of article 48. It may be noted that the Constituent Assembly was in favour of a total prohibition of cow-slaughter. Similarly state legislatures on the basis of the directive principle banned cow-slaughter. It is submitted that the underlying principle of article 48 should have been taken into account by the

Court before giving a final verdict. It was on account of the sanctity of the cow in Hinduism that even Muslim rulers sometimes prohibited cow-slaughter. It is reported that Babar had not only banned the cow-slaughter but also advised his son Humanyu to do so.[60] Since reverence to cow is a part of Hindu culture, it is in fitness of things that at-least in India where the overwhelming majority is that of Hindus, cow-slaughter should have been banned in order to preserve the culture of the majority community irrespective of any economic considerations. When we pay our veneration to some object it is a matter of faith and conscience, and economic factors should not be brought into it. When article 48 was being discussed in the Constituent Assembly, several members pleaded the prohibition of cow slaughter on the basis of its economic advantage. The same arguments were advanced by the supporters of total ban before the Court. That approach itself was wrong. Our approach should have been clear and straight forward. Religious belief is not a question of argument and reason, but of faith.[61] If Hindu society feels that preservation of its culture necessitates the prohibition of cow-slaughter, it is submitted, that restrictions on cow-slaughter should be upheld as falling within article 19(6).

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60. *Mohammad Hanif Quareshi v. State of Bihar*, AIR 1958 SC 731, 740. *Supra* p.232, note 18.

61. See *supra* pp. 134-8.

In a number of cases[62] where Muslims were prosecuted under section 298 of the Indian Penal Code for openly slaughtering cows on Bakr-Id day, a number of courts recognised that the slaughter of cows was abhorrent to the sentiments of the Hindus. The discussion in the Constituent Assembly[63] and its committees on the matter shows that the prohibition was based on sentimental grounds.[64] The state governments in order to give effect to the directive principle of article 48 enacted legislations prohibiting the killing of cows and other milch and draught animals. Though the Court declared illegal the total prohibition of the slaughter of animals other than cows and calves, if sentiment part of the reasoning is abandoned, it may be, that in future, the courts may not find any good reason to uphold the total prohibition in case of cows.

In the United States the conflict between the sentiments of a section of the people with the constitutional

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62. Kitab Ali Munshi v. Santi Ranjan Deb, AIR 1965 Tripura 22; Mir Chittan v. Emperor, AIR 1937 All 13, Khan Baputi Dewan v. Hispati Pundit, 27 Cal 655(1900).

63. Constituent Assembly Debates, VII, pp. 568-580.

64. See Austin, supra note 36 p. 82:
"... Article 48 shows that Hindu sentiment dominated in the Constituent Assembly."

freedom of carrying on the trade of slaughtering animals arose in a different way. In Slaughter-House Cases,[65] the legislature of a certain state in 1869 enacted a law restricting the indiscriminate slaughtering of animals.[66] A large number of butchers objected to such restrictions. They claimed it to be their constitutional right to carry on their trade of slaughtering animals and challenged the right of the state to put restrictions on such trade. The United States Supreme Court, by a majority decision held the enactment constitutional. The Court quoted, with approval, Chancellor Kent to the effect that,

> "Unwholesome trades, slaughter houses, operations offensive to the senses... (might) be interdicted by law, in the midst of dense masses of population, on the general and rational principle, that every person ought so to use his property as not to injure his neighbours."[67]

This case bears some analogy to Indian cases which upheld

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65. The Butchers' Benevolent Association of New Orleans v. The Crescent City Live-Stock Landing and Slaughter-House Company, 83 US (16 Wall.) 36 (1872).

66. The Act, called "An Act to Protect the Health of the City of New Orleans, to Locate the Stock-landings and Slaughter-houses", forbade the landing or slaughtering of animals, whose flesh was intended for food purposes except in slaughter-houses which were to be established for the purpose under the authority of the state.
    Id., at 59.

67. Id., at 62.

the prohibition relating to slaughter of animals in public places under section 298 of the Indian Penal Code and section 34 of the Police Act on the ground that it offended the feelings of a certain sections of the community.[68] The Slaughter-House cases[69] makes it clear that restrictions can be put in the United States on the slaughter of animals if it is in the interest of the health or even if they hurt the feelings of the people.

It seems that in the United States restrictions on the slaughter of animals, cannot be put if the results would be to prohibit the carrying on the business of a class of persons. In the Slaughter-House cases the butchers were not prohibited from carrying on their business, but they were merely required to slaughter animals at specified places. Had there actually been a total prohibition, it seems, the Court would have not upheld the

68. Supra note 62.

69. The Butchers' Benevolent Association of New Orleans v. The Crescent City Live-Stock Landing and Slaughter-House Company, 83 US (16 Wall) (1872).

legislation.[70] In *Margaret M. McGowan v. State of Maryland*,[71] Douglas, J., in his dissent, summarising the implications of the First Amendment said :

> "(T)he dogma, creed, scruples, or practices of no religious group or sect are to be preferred over those of any others; ... *the State cannot compel* one so to conduct himself as *not* to offend the religious scruples of another."[72]

In that case the appellants, the employees of a certain department store, were convicted for selling on a Sunday in violation of Sunday closing laws. Douglas, J., questioned the validity of a law which gave effect to the sentiments and religious feelings of a majority of the people, that is, Christians, who observe Sunday as a Sabbath day closing all business on Sunday. According to him it might amount to an establishment of religion. He referred to the fact that some people have religious scruples against eating pork. He posed the question: Would it be possible to make the pork selling an offence if the

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70. Cf. the American practice evidenced from the following statement:

> "The American judicial practice of refusing to explore matters of religious doctrine... would preclude a finding such as that in *M.H. Quareshi v. State of Bihar*."

Groves, Harry E., *Religious Freedom*, 4 JILI 191, 199 (1962).

71. 366 US 420 (1960).

72. *Id.*, at 563. Emphasis added.

majority of a state legislature had religious conviction that eating of pork was abhorrent? If some had religious scruples against slaughtering cattles: "Could a state legislature, dominated by that group, make it criminal to run an abattoir?"[73]

To sum up, we find that while in India a total prohibition of the slaughter of cows has been upheld, in the United States, it seems, the same might not be possible. It may also be noted that since the Supreme Court of India has changed its opinion in Mohammad Faruk v. State of Madhya Pradesh[74] regarding the consideration of sentiments as one of the grounds for upholding the validity of legislation, there is a possibility that it may, if occasion arises, change its view taken in Mohammad Hanif Quareshi v. State of Bihar[75] and a total prohibition of cow slaughter may be found unreasonable. It would be recalled that in the United States, in Slaughter-House cases,[76] the appellants had contended that the legislation which gave monopoly to a certain company to establish slaughter-houses virtually prohibited the

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73. Id., at 575.

74. Decided April 1, 1969. AIR 1969 NSC 14, The Statesman, April 3, 1969, p.6.

75. AIR 1958 SC 731.

76. The Butchers' Benevolent Association of New Orleans v. The Crescent City Live-Stock Landing and Slaughter-House Company, 83 US (16 Wall) 36 (1872).

butchers in general to carry on their trade of slaughtering animals. But the Court rejected the contention on the ground that since the legislation had required the company to allow all persons, who so desired to slaughter their animals in their slaughter-houses there was actually no prohibition. It was only a health regulation prohibiting killing of animals at any place where a butcher might choose to do so. Since a total prohibition on slaughter of animals in the United States on religious grounds might amount to an establishment of religion it would be unconstitutional. In India there being nothing like an establishment clause the state may foster religions. A restriction on prohibition of cow-slaughter, it is submitted, even if it amounts to a kind of help to religion would not be unconstitutional.

(c) Religious Freedom and the Right to Equality.

In the field of right to equality several provisions of our Constitution are aimed against discriminatory practices. There are, at the same time, various provisions[77] recognising exceptions to the right to equality on various grounds. In such cases religious freedom has to give way to such provisions. For instance article 16, while

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77. E.g., articles 15(4); 16(4) and 16(5).

guaranteeing equality of opportunity for employment to all citizens, allows the state to reserve posts for any backward classes of citizens.[78] This provision, called 'protective' discrimination, is intended for the betterment of backward classes of persons in the society. It is, however, to be noted that a person is considered backward not only in the social or educational sphere, but his backwardness may be attributed if he belongs to certain caste and sect. The caste system is based chiefly on religion although in distant past it might have been based on trade. In M.R. Balaji v.

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78. The relevant provision is as follows :

"16(1) There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State.

(2) No citizen shall, on grounds only of religion, race, caste,.... be ineligible for, or discriminated against in respect of any employment or office under the State....

(4) Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State.

(5) Nothing in this article shall affect the operation of any law which provides that the incumbent of an office in connection with the affairs of any religious or denominational institution or any member of the governing body thereof shall be a person professing a particular religion or belonging to a particular denomination."

The State of Mysore,[79] the Supreme Court refrained from laying down any hard and fast rule, with respect to the declaration of backward classes.[80] The Court, however, deprecated the test of backwardness on the basis of caste.[81] Actually caste is the touchstone of backwardness. The need for giving protection to backward classes was involved in a Mysore case.[82] There the state Government selected for appointment ten candidates. Of these seven candidates of backward classes were given weightage. The remaining were chosen on merit. Under the rules for recruitment framed by the state Government, "all communities other than Brahmins" were classed as backward communities. The petitioner who had secured a seventh place in order of merit was not selected. He contended that it was a

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79. AIR 1963 SC 649. See also P. Rajendran v. State of Madras, AIR 1968 SC 1012 and State of Andhra Pradesh v. P. Sagar, AIR 1968 AP 1379, and Commentby Nayar, V. Narayanan, Rajendran v. State of Madras, AIR 1969 JO 88.

80. Id., at 661.

81. The Backward Classes Commission, in its report dated March 30, 1955, after having considered various methods for determining which classes are backward, ultimately decided to treat the status of caste as an important factor in that behalf and it was on that basis that a list of backward communities was made. Referred to ibid, at 655.

In the instant case the Nagar Gowda Committee appointed by the state had also recommended classification on the basis mainly of caste.
Id., at 656.

82. Kesava Iyengar v. State of Mysore, AIR 1956 Mys 20.

clear case of discrimination against meritorious candidates. The Court, however, upheld the protection given to backward classes as legally valid under article 16(4) of the Constitution.

In a later case,[83] the state of Jammu and Kashmir laid down a community-wise formula for the recruitment to services under the state. On that basis it reserved 50 per cent posts for the Muslims of Kashmir, 40 per cent for for the Jammu Hindus, and 10 per cent for the Kashmir Hindus. It was contended by the state that Muslims in the state of Jammu and Kashmir formed a backward class of citizens. Similarly the Jammu Hindus were a backward community. None of them were adequately represented in the services of the state. The state in pursuance of article 16(4) of the Constitution reserved all seats for the two communities as indicated above. The petitioners who were Kashmiri Hindus claimed that they had been discriminated against in the matter of promotion solely on the ground of religion and place of residence. They contended that the state had acted purely on communal basis in as much as the senior members of the service belonging to one community had been placed below the junior members

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83. Triloki Nath Tiku v. State of Jammu and Kashmir, AIR 1969 SC 1.

of another community. The Supreme Court while holding the aforesaid reservation violative of article 16(2) of the Constitution said that the expression "backward class" in article 16 was not synonymous with "backward caste" or "backward community." The Court said :

> "The members of an entire caste or community may in the social, economic and educational scale of values at a given time be backward and may on that account be treated as a backward class, but that is not because they are members of a caste or community, but because they form a class."[84]

The Court also pointed out that a test of backwardness based solely on caste, race, religion, sex, place of birth or residence directly offended the Constitution. The order of the state, in this case was made to give "adequate representation of such elements as were not adequately represented in the services." This could not be treated by the Court as making a provision for reservation of appointment in favour of backward classes.

This question came up in another form before the Supreme Court in _T. Devadasan_ v. _Union of India_.[85] In that case, the petitioner challenged the rule of the Central Government which reserved 17½ per cent of all posts under the Government of India for the scheduled castes and tribes. The rule further provided that in case the candidates

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84. _Id._, at 3.

85. AIR 1964 SC 175.

belonging to the reserved class did not possess the prescribed minimum qualification or were unsuitable, the posts could be filled up by other deserving candidates provided the posts reserved for the scheduled castes and tribes would be carried over the next year. If next year the requisite number of candidates of the scheduled class were not found qualified, the "carry forward" rule would again be applied in the subsequent year. In the instant case, 65 per cent candidates of the reserved class and 35 per cent of other classes were appointed. The applicant claimed that though he had obtained 61 per cent marks he was not chosen, while candidates of the reserved class obtaining as low as 35 per cent marks were appointed. Had 17½ per cent candidates been taken from the reserved class without applying the "carry forward" rule, he would have a fair chance of being selected. The Supreme Court, in its majority judgment, held the "carry forward" rule as repugnant to equality clause of the Constitution.

Article 15 lays down a general rule of nondiscrimination on grounds of religion, race caste and so forth, and article 29[86] prohibits discrimination in admission to educational institutions on abovementioned grounds. In

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86. Article 29(2) says :
"No citizen shall be denied admission into any educational institution maintained by the State or receiving aid out of State funds on grounds only of religion, race, caste, language or any of them."

State of Madras v. Smt. Champakam Dorairajan,[87] the Madras Government allotted seats in the state Medical College community-wise. The main idea behind this arrangement was to afford facilities to backward classes to get higher education. The order of the Madras Government was declared bad. The Madras High Court stated that "no person of a particular religion or caste (should) be treated unfavourably when compared with persons of other religions and castes merely on the ground that they belong to a particular religion or caste."[88] On appeal, the Supreme Court too took the same view. As a sequel to this decision, clause 4 was inserted in article 15 to authorise the state to make special provision for socially and educationally backward classes of citizens.[89] In M.R. Balaji v. The State of Mysore,[90] the Supreme Court held that though the Government was entitled under article 15(4) to give preferential treatment to the backward classes, a reservation of more than 50 per cent of the seats could not be treated as reasonable. In the opinion of the Court it would be a fraud on the Constitution if 68 per cent seats were reserved for the protected classes

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87. AIR 1951 SC 226.

88. Smt. Champakam Dorairajan v. State of Madras, AIR 1951 Mad 120, 125.

89. Clause 4 reads as follows :
"Nothing in this article or in clause (2) of article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes."

90. AIR 1963 SC 649.

as was actually done in the case. At any rate, the state under the provisions of the Constitution is empowered to reserve a reasonable percentage of seats or posts for the backward classes.

In the United States the problem is not so acute. It is true that in some educational institutions racial discrimination is still practised,[91] but such practices are gradually going down. As to the question of discrimination on religious grounds the Constitution itself declares in unequivocal terms that "no religious test shall be required as a qualification to any office or public trust under the United States."[92] In Roy R. Torcaso v. Clayton K. Watkins,[93]

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91. See Brenda K. Monroe v. Board of Commissioners of the City of Jackson, Tennessee, 20 L ed 2d 733 (1968), AIR 1969 USSC 46. In Green v. School Board of New Kent County, 20 L ed 2d 716 (1968), AIR 1969 USSC 1, where the United States Supreme Court deprecated the practice of racial discrimination in educational institutions even after 13 years of its announcement in Oliver Brown v. Board of Education of Topeka, 349 US 294 (1955) that the non-discrimination should be speeded up. It may, however, be noted that now the trend of desegration in educational institutions is going down and it seems that the present day negro wants separate facilities of education for "black studies." "Today, new leaders preach black "nationhood", not integration per se. Negro students now feel an even heavier responsibility than their predecessors - not to escape the ghetto, but to return to it and improve the lot of the black community at large." Time essay, The Dilemma of Black Studies, Time, (Asia edition), May 2, 1969, p.32.

92. Article VI (3), United States Constitution.

93. 367 US 488 (1961).

the state in making appointments in government offices took into consideration a person's religious belief. It was held by the United States Supreme Court that the state could not do so. It could not ask an applicant for appointment to an office to declare his faith in the existence of God. This question was again raised in Chamberlin v. Dade County Board of Public Instruction,[94] but the Court by a majority opinion rejected the appeal, "for want of properly presented federal questions."[95] In that case, the applicants for teaching posts were required to answer the question in the form of, "Do you believe in God?" It was also a fact that religious attitudes of the applicants were taken into account in making promotions.[96] Douglas, Black, and Stewart, JJ., in their dissent were of the opinion that these facts sufficiently presented the federal questions and that the Court should decide the case on merit. It may, however, be noted that under the provisions of the Constitution a religious test cannot be legally imposed for any appointment and any such provision would be prima facie invalid.

There is another matter in which discrimination may be said to arise. For example Parliament has made a number

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94. 377 US 402 (1964).

95. Id., at 402.

96. Id., at 403, fn.1 (per separate opinion of Douglas, J.)

of enactments[97] in order to give effect to directive principles of state policy as embodied in article 44[98] of the Constitution. But curiously enough all such enactments lay down restrictions and prohibitions for Hindus only. It may well be that they have been made only as a first step towards uniform civil code which would apply to all persons irrespective of their religion. But unless that is done, a discrimination based on religion may be said to exist. Likewise certain state enactments[99] prohibiting polygamy apply only to Hindus and certain other communities but are not applicable to Muslims.[100] This may be a discrimination

97. E.g., the Hindu Marriage Act, 1955 (Act 25 of 1955), the Hindu Succession Act, 1956 (Act 30 of 1956), the Hindu Minority and Guardianship Act, 1956 (Act 32 of 1956), the Hindu Adoptions and Maintenance Act, 1956 (Act 78 of 1956), the Hindu Women's Rights to Property Act, 1937 (Act 18 of 1937) etc.

98. "The State shall endeavour to secure for the citizens a uniform civil code throughout the territory of India."

99. The Bombay Prevention of Bigamous Marriages Act, 1946 (Bom. Act 24 of 1946 as amended by Bom. Act 38 of 1948) and the Madras Hindu (Bigamy Prevention and Divorce) Act, 1949 (Mad. Act 6 of 1949).

100. The Hindu Marriage Act, 1955 (Act 25 of 1955) makes monogamy a rule for all Hindus, Buddhists, Jains and Sikhs. The Parsi Marriage and Divorce Act, 1936 (Act 3 of 1936) prohibits polygamy amongst Parsis. The persons married under the Special Marriage Act, 1954 (Act 43 of 1954) are also prohibited to practise polygamy. In each of these cases the offender is liable under section 494 of the Indian Penal Code.

against Hindus in violation of article 14 of the Constitution, irrespective of its violation of the article in support of religion.

In conclusion, we find that there is a difference between India and the United States in the field of equality having reference to religious freedom. Several inroads have been made to the equality clause of the Indian Constitution. These in one way or other affect freedom of religion but 'social welfare and reform'[101] can operate as a justification for any attack upon profession, practice and propagation of religion. In the United States the problem of racial discrimination exists but the courts have in a number of cases held such discrimination objectionable.[102]

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101. See article 25(2)(b), discussed *infra* pp. 472-4.

102. Recently the United States Supreme Court reversed the conviction of a "white person" by the Virginia Supreme Court for his marrying a "colored person." Both the "white person" the husband and the "colored person", the wife went to Columbia and married themselves. After their marriage they returned to their home in Virginia. There they were sentenced to one year imprisonment for violating Virginia's ban on inter-racial marriages. Warren, C.J., delivering the opinion of the Court said :

> "The freedom to marry has long been recognised as one of the vital personal rights essential to the orderly pursuit of happiness by freemen... the freedom to marry, or not marry, a person of another race resides with the individual and cannot be infringed by the State."

Richard Perray Loving v. *Virginia*, 388 US 1, 12-3 (1967).

(d) Religious Freedom and Untouchability:

The practice of untouchability based as it is mainly on caste system has been a blot on Hindu society. A determined effort has been made to abolish this social evil. Article 17[103] of the Constitution itself abolishes it in unequivocal terms and makes its practice a punishable offence.[104] In pursuance of this article, the Parliament enacted the Untouchability (Offences) Act, 1955,[105] prescribing punishments for the practice of untouchability.[106]

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103. '"Untouchability" is abolished and its practice in any form is forbidden. The enforcement of any disability arising out of "untouchability" shall be an offence punishable in accordance with law.' Article 17, Constitution of India.

104. Even prior to the adoption of our Constitution a number of states had enacted state legislations to prohibit and punish untouchability. See supra p.232, notes 71 and 72.

105. Act 22 of 1955.

106. The Act has several special features compared with the other state laws which were in existence at its commencement. It is not confined to Hindus only. It punishes all persons who take part in the excommunication of, or imposition of any social disability on, any person who refuses to practise untouchability (Section 7). In addition to the normal penalty, the court is empowered to cancel or suspend any licence in respect of profession, trade, calling or employment wherein discrimination is being practised. (Section 8). The offence of untouchability is made cognizable (Section 15). Section 17 repealed all the state enactments in this respect.

The inverted commas put on the word 'untouchability' in article 17 suggests that untouchability has not been used in its literal sense but in a special sense in view of Indian conditions. In a Mysore case,[107] it was made clear that the isolation of individuals during epidemic or because they are suffering from contagious disease or because of some social observances such as are associated with birth or death in the family have nothing to do with untouchability. Here we are concerned with the untouchability whereby certain section of the community on account of their birth or profession are shunned and excluded from worship in a temple. In order to remove this disability the practice of untouchability has been prohibited by article 17 of the Constitution.

In the United States negroes are practically segregated not only in the educational institutions[108] but even in religious institutions. There are separate churches for them and they have separate congregations. Though in

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107. Devarajiah v. B. Padmanna, AIR 1958 Mys 84.

108. In practice discrimination still exists in educational institutions. See Green v. School Board of New Kent County, 20 L ed 2d 716 (1968), AIR 1969 USSC 1. Raney v. Board of Education of the Gould School District, 20 L ed 2d 727 (1968), Brenda K. Monroe v. Board of Commissioners of the City of Jackson, Tennessee, 20 L ed 2d 733 (1968), AIR 1969 USSC 46.

recent times the American opinion backed by decisions of courts looks with disfavour discriminations in many other civic matters,[109] it has not reacted in the sphere of religious practices. So far as the state is concerned it cannot directly interfere with religious practices on account of the establishment clause unless such practices infringe on civil liberties of citizens. Recently the American Government has taken steps to prohibit discrimination in places of public resort such as segregation in theatres, cinemas and public parks.[110]

(e) Religious Freedom of the Individual and of the Denomination.

It may be recalled that article 25 deals with the right of freedom of an individual, and article 26 deals with the right of every religious denomination to control

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109. See, e.g., in the field of education, Oliver Brown v. Board of Education of Topeka, 347 US 483 (1954), supp. opinion 349 US 294 (1955), William G. Cooper v. John Aaron, 358 US 1 (1958) and Commonwealth of Pennsylvania v. Board of Directors of City Trusts of the City of Philadelphia, 353 US 230 (1957); in the field of transportation, Aurelia S. Browder v. W.A. Gayle, 142 F Supp. 707 (1956), affirmed Gayle v. Browder 352 US 903 (1956) and O.Z. Evers v. John T. Dwyer, 358 US 202 (1958); in the field of recreational facilities, Mayor and City Council of Baltimore v. Robert M. Dawson, 350 US 877 (1955); in the field of miscegenation (inter-racial marriage), Richard Perry Loving v. Virginia, 388 US 1 (1967).

110. The Civil Liberties Act, 1964.

its institutions in matters of religion.[111] Since the Shirur Math case[112] it is now accepted that religious freedom extends to matters which are an essential part of religion. What part is essential is ordinarily to be decided with reference to the doctrines of that religion itself. As article 25 is subject to article 26 the freedom of the denomination prevails over the freedom of the individual. It follows that if a conflict arises between religious freedom of the individual and the freedom of a denomination the former must give way to the latter.

Both in India and the United States the trend of judicial opinion is to give preference to the religious rights and practices of an organised denomination in case of any conflict with the individual freedom. In India, one conspicuous example is Sardar Syedna Taher Saifuddin Saheb v. State of Bombay.[113] In that case the head of an institution claimed the right to excommunicate a member of his community in the face of a statute prohibiting excommunication. The statute recognised the right of the individual

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111. "Subject to public order, morality and health, every religious denomination or any section thereof shall have the right -
(a) to establish and maintain institutions for religious and charitable purposes;
(b) to manage its own affairs in matters of religion;
(c) to own and acquire movable and immovable property; and
(d) to administer such property in accordance with law." Article 26, Constitution of India.

112. Commissioner Hindu Religious Endowments, Madras v. Sri Lakshmindra Tirtha Swamiar of Sri Shirur Mutt, AIR 1954 SC 282.

to believe or disbelieve in the authority of the community and its head. Though the Bombay High Court in an earlier case had held the statute valid, the Supreme Court in the instant case declared the same invalid as an infringement of the right of the denomination guaranteed in article 26(b). It may be noted that articles 25 and 26 guaranteeing religious freedom are clear because of the words "subject to the other provision of this part" in article 26, implying that article 25 must give way to article 26. The head of the Dawoodi Bohra community only claimed the right to excommunicate a member of his community on grounds of indiscipline. He believed that the practice of excommunication was an essential part of religious discipline. If one wants to be a member of an organised religious group, he must either conform to the tenets of its faith or convince others that the views which he holds are correct. If he is unable to do so, he must either submit to the views of the community or go out. If the community does not allow him to remain within it on account of his heretical views, it cannot be said that the community has exceeded its limits or encroached on the right of the individual to believe anything he likes. Under article 26 of the Constitution the denomination has a right to manage its own affairs in matters of religion and unwillingness to condone heresay or tolerate indiscipline is a part of the exercise of this right.

In America the relationship between the religious freedom of the individual and of a religious group may arise in a different context. For instance, it has been a practice since long in the United States to observe one day rest every week.[114] As the majority of the population follows Christianity, Sunday, the Lord's day, is observed as the rest day everywhere in America. In several cases attempts were made to get the laws enforcing Sunday holidays declared violative of the establishment clause. But though these attempts have failed,[115] the followers of other religions have now been allowed to observe rest on any other day auspicious according to their religions,[116] in addition to Sunday.[117] Earlier in Margaret M.McGowan v. State of Maryland,[118]

114. This practice has recently been adopted in India under the Weekly Holidays Act, 1942 (Act 18 of 1942).

115. See, e.g., Margaret M.McGowan v. State of Maryland, 366 US 420(1961); Two Guys From Harrison - Allentown v. Paul A. McGinley, 366 US 582(1961); Abraham Braunfeld v. Albert N. Brown, 366 US 599 (1961) and Gallagher v. Crown Kosher Super Market of Massachusetts, 366 US 617 (1961).

116. Adell H. Sherbert v. Charlie V. Verner, 374 US 398(1963). The refusal of a Seventh-day Adventist to work on Saturday, her Sabbath day, was accepted.

117. Abraham Braunfeld v. Albert N.Brown, 366 US 599 (1961) and Gallagher v. Crown Kosher Super Market of Massachusetts, 366 US 617 (1961). Appellants, in both the cases being Jews asserted that their faith requires the closing of their places of business from sunset of each Friday to sunset of each Saturday. If they were required to close on Sunday also, it would mean that they would carry on their business only for four and a half days. The contention was, however, repelled by the Court.

118. 366 US 420 (1961).

the Supreme Court had upheld the validity of a Sunday closing legislation on the ground that the purpose and effect of such legislation was not to aid any religion but to set aside a day in a week as a day of rest and recreation. Douglas, J., disfavoured the recognition of different religious holidays by the state.[119] In his dissenting opinions, he took the view that to penalise by law persons who did not suspend their work either on Sundays or even on any other day recognised by their religions, would be an aid to all organised religions and would infringe the establishment clause of the First Amendment.[120] He condemned laws which recognised different days of rest to different persons simply on religious grounds. He also pointed out that if a person did not follow any recognised religion, he had no right under the law to get leave from work for religious observance on the day which might be auspicious for him.[121]

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119. Arlan's Department Store of Louisville v. Kentucky, 371 US 218 (1962); Margaret M. McGowan v. State of Maryland, 366 US 420 (1961); and Gallagher v. Crown Kosher Super Market of Massachusetts, 366 US 617 (1961).

120. Margaret M. McGowan v. State of Maryland, 366 US 420, 561, 534 (1961).

121. Arlan's Department Store of Louisville v. Kentucky, 371 US 218 (1962).

In *Adell H. Sherbert* v. *Charlie V. Verner*[122] the same question arose in a different form. In that case a Seventh-day Adventist was discharged from service by her employer as she had refused to work on Saturday, the Sabbath day of her faith. She claimed unemployment compensation under a state law[123] providing for such compensation. She could not get the compensation as she had refused to work on Saturday, a working day. The United States Supreme Court by majority held that the denial of unemployment compensation benefits to the Seventh-day Adventist was an unreasonable restriction on the free exercise of her religion.[124] The government is under an obligation to be neutral in the face of religious differences. It cannot constitutionally apply the unemployment eligibility provisions so as to constrain a worker to abandon his religious beliefs in respect of appropriate day of rest.[125] Harlan, J., in his dissent, however, said[126] that if a person was not available for work due to Sabbath,

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122. 374 US 398 (1963).

123. The South Carolina Unemployment Compensation Act (S.C. Code, Title 68) allows compensation to all those who could not get an employment provided that if a suitable work was arranged it should be accepted and in case of refusal the compensation was not to be granted.
Id., fn. 3 at p.400.

124. For a critical study of this case, see Weiss, *Privilege Posture and Protection: "Religion" in the Law*, 73 Yale L.J. 593, pp. 620-2 (1964).

125. *Adell H. Sherbert* v. *Charlie V. Verner*, 374 US 398, 410 (1963).

126. White, J., concurred in the dissent.

he must be treated just as any other person who refused to work on Saturday for personal reasons. If the compensation was given to a person who objected to work on Saturday due to his religious belief, it could mean a financial aid to an organised religion. Explaining this point he said:

> "The State, in other words, must single out for financial assistance those whose behaviour is religiously motivated, even though it denies such assistance to others whose identical behaviour (in this case, inability to work on Saturdays) is not religiously motivated."[127]

For him this would be a violation of the establishment clause of the First Amendment.

Turning to India we find that in *Sardar Syadna Taher Saifuddin Saheb v. State of Bombay*[128] Sinha, C.J., in his dissent, criticised the approach adopted by the majority of the judges. He was of the opinion that to hold the law prohibiting excommunication invalid would amount to preference being given to an organised religion against the religious freedom of the individual. On the relationship between articles 25 and 26, he said that the right guaranteed by article 25 is an individual right as distinguished from the right of an organised body like a religious denomination or any section thereof dealt with by article 26. He reasoned that every member of a community has the right as long as

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127. *Adell H. Sherbert v. Charlie V. Verner*, 374 US 398, 422 (1963).

128. AIR 1962 SC 853.

he did not interfere with the corresponding rights of others to profess, practise and propagate his religion. If the religious freedom of an individual was subordinate to the rights of the denomination, he questioned: "Can an individual be compelled to have a particular belief on pain of penalty, like excommunication?" He answered that the Constitution has guaranteed every person freedom to worship according to the dictates of his conscience. He had the right unfettered so long as it did not come into conflict with any restraints imposed by the state in the interest of public order and morality etc. He could not be questioned as to his religious beliefs either by the state or by any other person. The head of the Dawoodi Bohra community had contended that he had a right to excommunicate a person for his heretical beliefs. The freedom guaranteed to a denomination in matters of religion under article 26(b) cover up this right of a religious community and its head. But Sinha, C.J., held that the matters of religion in article 26(b) were confined to matters connected with the rites and ceremonies in regard to religious practices. According to him a distinction ought to be made between practices consisting of rites and ceremonies connected with the particular kind of worship, which is the tenet of the religious community, and practices

in other matters which might touch the religious institutions at several points, but which were not intimately concerned with rites and ceremonies, as an essential part of the religion.[129] Moreover, he argued that in the instant case an excommunication resulted in depriving a person of the enjoyment of his civil rights. In so far as the legislation protected the civil rights of the members of a community, he opined that it should be deemed valid under article 25(2)(b) as a social welfare and reform. It may, however, be noted that article 25 is clear in that the religious freedom of the individual must give way to the religious freedom of the group guaranteed in a separate article. In case of any difference the latter must be accorded a preferential position. This principle has been preferred both in India and in the United States as the cases referred to above show.

Concluding we find that in India article 25 itself subjects religious freedom to other fundamental rights of the Constitution. In the United States the religious freedom being given in absolute terms by the Constitution,

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129. *Id.*, at 564.

it is the task of the courts to pass on the specific situations and the rival claims based on different rights. By and large they give preference to religious freedom over other rights.

In the case of property rights, legislation in both the countries, has given a preferential treatment to property rights over the right of religious propagation. This principle has, however, not been applied in the United States to street propagations. So far as the freedom to equality is concerned, our equality provisions contain exceptions based mainly on religion, race or caste. Here religious freedom is restricted. In the United States there is the problem of racial discrimination. Legislative measures have tried to tackle the problem but in practice it has not been completely eliminated. Such discrimination exists in separate churches and separate congregations for the whites and the non-whites. When we consider the question of the religious freedom of the individual and that of the denomination we find that the courts in both the countries have accorded a higher position to denominational freedom over that of the individual. The excommunication case in India, and the prayer and sabathday cases in America show that the judges give preference to denominations and organised religions over the freedom of the individual.

Chapter XVI

Secular and Economic Activities Associated with Religious Practices.

Article 25(2)(a) saves a law regulating or restricting any economic, financial, political or other secular activity associated with religion. This does not contemplate state regulation of religious practices which are protected unless they run counter to public order, morality or health but of activities of an economic, commercial or political character when associated with religious practice. So far as the religious practices are concerned they may be, under the terms of article 25(1), regulated on the grounds of public order, health and morality. The overriding power of the state under article 25(2) is merely "to regulate and restrict" certain secular activities. It does not, it seems, confer a right to "prohibit" such practices altogether.[1] Similarly, article 26 lays down that subject to public order, morality and health, every religious denomination or a section of it has the right to establish and maintain institution for religious or charitable purposes, to manage its own affairs in matters of religion, to own and acquire movable and immovable property, and to administer such property in

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1. An attempt was made in the Constituent Assembly to add the word 'prohibit' also, but this move was rejected. Constituent Assembly Debates, VII, pp. 826-27.
   In Saghir Ahmad v. State of Uttar Pradesh, AIR 1954 SC 728, 737, and Mohammad Hanif Quareshi v. State of Bihar, AIR 1958 SC 731, 744, the question was raised but it was left undecided. In Narendra Kumar v. The Union of India, AIR 1960 SC 430, the Supreme Court interpreted the word 'restriction' used in article 19, and held that it included 'prohibition.'

accordance with law. As is clear from the language of clauses (b) and (d) of article 26, there is an essential difference between the right of a denomination to manage its religious affairs and its right to manage its property. Whereas the former is a guaranteed right which no legislation can take away (except for health, morality and public order), the right to administer property can be exercised only "in accordance with law." This means that the state can regulate the administration of religious property by means of validly enacted laws. In other words, while matters of religion cannot, broadly speaking, be touched, the same is not true of property in the hands of denominations. In matters of property there is always a secular overtone.

A reading of the Supreme Court cases show that they have taken a realistic, as well as more traditionally Indian, view of what constitutes secular activity associated with religion.

We proceed to consider how secular activities associated with religious practices have been dealt with by the courts. We find that they have evolved a rule which permits as little interference as possible. The first important case is Commissioner Hindu Religious Endowments, Madras v. Sri Lakshmindra Tirtha Swamiar of Sri Shirur Mutt,[2] where section 56 of the Madras Act[3] had empowered the Commissioner to call

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2. AIR 1954 SC 282.
3. The Madras Hindu Religious and Charitable Endowments Act, 1951 (Mad. Act 19 of 1951).

upon the trustees to appoint a manager for the administration of the secular affairs of the institution and in default of such appointment to make the appointment himself. The Supreme Court held the enabling Act ultravires article 26(d). The Supreme Court said :

> "Under Art. 26(b), therefore, a religious denomination or organization enjoys complete autonomy in the matter of deciding as to what rites and ceremonies are essential according to the tenets of the religion they hold and no outside authority has any jurisdiction to interfere with their decision in such matters.
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> "Of course, the scale of expenses to be incurred in connection with these religious observances would be a matter of administration of property belonging to the religious denomination and can be controlled by secular authorities in accordance with any law laid down by a competent Legislature; for it could not be the injunction of any religion to destroy the institution and its endowments by incurring wasteful expenditure on rites and ceremonies. It should, be noticed, however, that under Art. 26(d), it is the fundamental right of a religious denomination or its representative to administer its properties in accordance with law; and the law, therefore, must leave the right of administration to the religious denomination itself subject to such restrictions and regulations as it might choose to impose.
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> "A law which takes away the right of administration from the hands of a religious denomination altogether and vests it in any other authority would amount to a violation of the right guaranteed under cl. (d) of Art. 26."[4]

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4. Commissioner Hindu Religious Endowments, Madras v. Sri Lakshmindra Tirtha Swamiar of Sri Shirur Mutt, AIR 1954 SC 282, 291.

In Ratilal Panachand Gandhi v. State of Bombay their Lordships further say:[5]

> "What sub-cl.(a) of cl.(2) of Article 25 contemplates is not State regulation of the religious practices as such which are really of an economic, commercial or political character though they are associated with religious practices.
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> "... The language of the two cls. (b) and (d) of Art. 26 would at once bring out the difference between the two. In regard to affairs in matters of religion, the right of management given to a religious body is a guaranteed fundamental right which no legislation can take away. On the other hand, as regards administration of property which a religious denomination is entitled to own and acquire, it has undoubtedly the right to administer such property but only in accordance with law. This means that the State can regulate the administration of trust properties by means of laws validly enacted; but here again it should be remembered that under Art. 26(d), it is the religious denomination itself which has been given the right to administer its property in accordance with any law which the State may validly impose. A law, which takes away the right of administration altogether from the religious denomination and vests it in any other or secular authority, would amount to violation of the right which is guaranteed by Art. 26(d) of the Constitution....
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> "Religious practices or performances of acts in pursuance of religious belief are as much a part of religion as faith or belief in particular doctrines. Thus if the tenets of the Jain or the Parsi religion lay down that certain rites and ceremonies are to be performed at certain times and in a particular manner, it cannot be said that these are secular activities partaking of commercial or economic character simply because they involve expenditure of money or employment of priests or the use of marketable commodities. No outside authority has any right to say that these

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5. AIR 1954 SC 388, 391-2.

are not essential parts of religion and it is not open to the secular authority of the State to restrict or prohibit them in any manner they like under the guise of administering the trust estate.

"Of course, the scale of expenses to be incurred in connection with these religious observances may be & is a matter of administration of property belonging to religious institutions; and if the expenses on these heads are likely to deplete the endowed properties or affect the stability of the institution, proper control can certainly be exercised by State agencies as the law provides. We may refer in this connection to the observations of Davar, J. in the case of - 'Jamshed Ji v. Soonabai, 33 Bom 122, and although they were made in a case where the question was whether the bequest of property by a Parsi testator for the purpose of perpetual celebration of ceremonies like Muktadbaj, Vyezashni, etc., which are sanctioned by the Zoroastrian religion were valid charitable gifts, the observations, we think are quite appropriate for our present purpose.

"If this is the belief of the community," thus observed the learned Judge,

"and it is proved undoubtedly to be the belief of the Zoroastrian community, - a secular Judge is bound to accept that belief - it is not for him to sit in judgment on that belief, he has no right to interfere with the conscience of a donor who makes a gift in favour of what he believes to be the advancement of his religion and the welfare of his community or mankind."

These observations do, in our opinion, afford an indication of the measure of protection that is given by Art. 26(b) of our Constitution."

It may be noted that in Shirur Math case[6] though section 26 of the Madras Act[7] was held violative of article 26(d),

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6. Commissioner Hindu Religious Endowments, Madras v. Sri Lakshmindra Tirtha Swamiar of Sri Shirur Mutt, AIR 1954 SC 282.

7. The Madras Hindu Religious and Charitable Endowments Act, 1951 (Madras Act 19 of 1951).

it was within the permissible limits of article 25(2) (a).[8] Other sections of the impugned Act dealing with secular activities were, however, held to be valid. Section 20 had placed the administration of the religious endowments under the general superintendence and control of the Commissioner. Section 52 enumerated several grounds on which a suit could be brought before a court for removing a trustee.[9] Both these sections were upheld. In other cases also the appointment of committees for the management of religious institutions had been upheld by

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8. Thus in cases arising under the Muslim Waqf enactments the Indian courts have held that the appointment of Muttawalis being only a secular matter, the enactments making provision for their appointment and removal etc. were constitutional. See Hafiz Mohammad Zafar Ahmad v. U.P. Sunni Central Board of Waqf, Lucknow, AIR 1965 All 333, 342.

9. Statutory provisions for removal of trustees and shebaits have always been upheld. See Saligram v. Raghavacharya, AIR 1969 Pat 118 (DB). Even without such provisions, the courts have always exercised the power to remove shebaits in appropriate cases. See Mukherjea, B.K., The Hindu Law of Religious and Charitable Trust (1962, Eastern Law House, Calcutta), pp. 291 & 441; Mulla, D.F., Principles of Hindu Law (1969, N.M. Tripathi, Bombay), 456.

the Supreme Court.[10]

In order to understand the position better a discussion of a few Supreme Court cases seems advisable. In _Tilkayat Shri Govindlalji Maharaj v. State of Rajashthan_, the Nathdwara Temple Act, 1959[12] provided for the management of the temple through a Board. Section 16 of the Act laid down that subject to the provisions of the Act and of the rules made thereunder, the Board was to manage the properties and '_affairs of the temple_' and arrange for the conduct of daily worship and ceremonies and of festivals in the temple according to the customs and usages of the denomination to which the temple belonged.[13] The High Court of Rajasthan took the view that the expression "affairs of the temple" was too wide and could include religious affairs of the temple. Since the relevant section did not require the management to be guided by the customs of the denomination, the High Court held that the import of the expression "affairs of the temple" in section 16 of the impugned Act was of such general nature that it could not be upheld.[14]

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10. See e.g., _Sardar Sarup Singh v. State of Punjab_, AIR 1959 SC 860; _Sadasib Prakash Brahmchari, Trustee of Mahinarakash v. The State of Orissa_, AIR 1956 SC 432; _Mahant Moti Das v. S.P.Sahi, the Special Officer in Charge of Hindu Religious Trust_, AIR 1959 SC 942; _The State of Bihar v. Bhabapritananda Ojha_, AIR 1959 SC 1073; _Durgah Committee, Ajmer v. Syed Hussain Ali_, AIR 1961 SC 1402; _Tilkayat Shri Govindlalji Maharaj v. State of Rajasthan_, AIR 1963 SC 1638; and _Raja Bira Kishora Deb, Hereditary Superintendent, Jagannath Temple, Puri v. The State of Orissa_, AIR 1964 SC 1501.
11. AIR 1963 SC 1638.
12. Rajasthan Act 13 of 1959.

The Supreme Court rejected the interpretation given to the expression "affairs of the temple" by the High Court and held that it covered only the secular affairs and therefore could not be objected to. The Court distinguished the two different sorts of duties which had been laid upon the Board. Firstly, the Board was to manage the properties and the secular affairs of the temple. Secondly it was to arrange for the religious worships, ceremonies and festivals in the temple. In so far as the management of the properties and the secular affairs were concerned the Court found that unlike the case of a Mahant or a shebait who enjoyed proprietary interest in the property, Tilkayat administered the affairs of the temple under the supervision of the Udaipur darbar and had certain rights under a Firman issued by the Maharana of Udaipur. The State of Rajasthan being the successor of the Udaipur State had the same rights of supervision which the Udaipur darbar had. Tilkayat was a mere custodian or manager of the temple property and there was no question that his proprietary

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13. Section 16 of the Nathdwara Temple Act 1959. Tilkayat Shri Govindlalji Maharaj v. State of Rajasthan, AIR 1963 SC 1638, 1653.

14. See, Tilkayat Govindlalji v. State, AIR 1962 Raj 196, pp. 213 and 215.

rights were being infringed. The state was fully empowered under article 26(d) to make laws for the administration of the properties of the denomination. Gajendragadkar, J., speaking for the Court, said :

> "It is urged that the right of the denomination to administer its property has virtually been taken away by the Act and so, it is invalid. It would be noticed that Art. 26(d) recognises the denomination's right to administer its property, but it clearly provides that the said right to administer the property must be in accordance with law....
>
> "Incidentally, this clause will help to determine the scope and effect of the provisions of Art.26(b). Administration of the denomination's property which is the subject-matter of this clause is obviously outside the scope of Art. 26(b). Matters relating to the administration of the denomination's property fall to be governed by Art. 26(d) and cannot attract the provisions of Art. 26(b). Article 26(b) relates to affairs in matters of religion such as the performance of the religious rites or ceremonies, or the observance of religious festivals and the like; it does not refer to the administration of the property at all. Article 26(d) therefore, justifies the enactment of a law to regulate the administration of the denomination's property and that is precisely what the Act has purported to do in the present case. If the clause "affairs in matters of religion" were to include affairs in regard to all matters, whether religious or not, the provision under Art. 26(d) for legislative regulation of the administration of the denomination's property would be rendered illusory."[15]

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15. Tilkayat Shri Govindlalji Maharaj v. State of Rajasthan, AIR 1963 SC 1638, 1662.

The second category of the duties imposed upon the Board was to arrange for the religious worship, ceremonies and festivals in the temple. All these were clearly "matters of religion" within the meaning of article 26(b) guaranteeing each denomination the right "to manage its own affairs in matters of religion." Since, however, these arrangements were to be made by the Board in accordance with the customs and usages of the denomination, the Court found nothing invalid in such arrangement. Explaining this point the Court said :

> "(T)he section (section 16 of the Nathdwara Temple Act) adds that it will be the duty of the Board to arrange for the religious worships, ceremonies and festivals in the temple, but this has to be done according to the customs and usages of the denomination. It is thus clear that the duties of the Board is so far as they relate to the worship and other religious ceremonies and festivals, it is the traditional customs and usage which is of paramount importance. In other words, the legislature has taken precaution to safeguard the due observance of the religious ceremonies, worship and festivals according to the custom and usage of the denomination."[16]

A similar question arose in Shri Jagannath Temple case, Raja Bira Kishore Deb, Hereditary Superintendent, Jagannath Temple, Puri v. The State of Orissa.[17] Section 15(1) of Shri Jagannath Temple Act, 1954,[18] authorised the committee constituted under the Act to arrange for the proper

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16. Id., at 1655.
17. AIR 1964 SC 1501.
18. Orissa Act 11 of 1955.

performance of the Sevapuja in the temple in accordance with the established record of rights.[19] The Court noted that the Sevapuja had two aspects - one aspect was the provision of materials and so on for the purpose of the Sevapuja and other was the performance of the Sevapuja in accordance with the record of rights. The former was a secular function and the latter religious one. It held that as section 15(1) of the impugned Act had merely authorised the committee to deal with secular aspect it could not be attacked. The Court said :

> "Clause (1) of S.15 has nothing to do with the second aspect, which is the religious aspect of the sevapuja; it deals with the secular aspect of the sevapuja and enjoins upon the committee the duty to provide for the proper performance of sevapuja and that is also in accordance with the record of rights. So the committee cannot deny materials for sevapuja if the record of rights says that certain materials are necessary. We are clearly of the opinion that cl. (1) imposes a duty on the committee to look after the secular part of the sevapuja and leaves the religious part thereof entirely untouched. Further under this clause it will be the duty of the committee to see that those who are to carry out the religious part of the duty do their duties properly. But this again is a secular function to see that sevaks and other servants carry out their duties properly; it does not interfere with the performance of religious duties themselves. The attack on this provision that it interferes with the religious affairs of the temple must therefore fail."[20]

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19. Section 15(1) read as follows :
"Subject to the provisions of this Act and the rules made thereunder, it shall be the duty of the Committee to arrange for the proper performance of sevapujah and of the daily and periodical Nitis of the Temple in accordance with the Record of Rights."

20. Raja Bira Kishore Deb, Hereditary Superintendent, Jagannath Temple, Puri v. State of Orissa, AIR 1964 SC 1501, 1510.

The Court also held that other sections[21] of the Act were not unconstitutional on the ground that they dealt with the secular aspect only.

To sum up, these cases establish that the right of a deonimation to manage its own affairs in matters of religion cannot be taken away although the right of administration of property may be regulated by law. This involves drawing a line between matters of religion and secular administration of property. The line cannot be drawn once for all. The courts take a commonsense view and are guided by consideration of practical necessity. If the tenets of a Hindu sect prescribe offerings of food to the idol at particular times, or prescribe periodical ceremonies to be performed

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21. So section 21 delimited the powers and duties of the administrator. He was authorised to collect the offerings made in the temple and decide disputes relating to its distribution, to appoint officers and employees of the temple, to lease out temple properties, to specify the conditions on which the sevaks and other office holders would be entitled to possess jewels and other valuable belongings of the temple, to require various sevaks to do their legitimate duties in time in accordance with the record of rights and in their absence to get the sevapuja performed by any other person in accordance with the record of rights and to afford facilities for special darshan or other religious services. Section 21A provided that all sevaks etc. had to work subject to the control of the administrator. Section 30A imposed a fine upto 500 rupees in case a person bound to perform sevapuja, refused or failed to perform the same when he was so asked to do so by the administrator. All these sections were held to deal with the secular aspect and as such valid.

in a certain way, or require daily recital of sacred texts, and oblations to the sacred fire; these are parts of religion. The fact that they involve expenditure and the use of marketable commodities will not make them secular activities of a commercial character,[22] they are matters of religion, protected by article 26(b).

Though the state can regulate administration of religious property, but it is the religious denomination itself which has the right to administer the property according to law. Thus a law can regulate administration of religious property but cannot take away the right of administration of property altogether from the hands of the denomination and vest it in another secular body. The law must leave the right of administration to the religious body itself subject to such restrictions and regulations as it might choose to impose.[23]

While in India the state has been given the power to interfere with the secular aspect of religious practices, the state has no such authority in the United States. The question of state control over church directly arose in _John Kedroff v. Saint Nicholas Cathedral of the Russian Orthodox Church in North America_.[24] As a sequel to Bolshevist Revolution of 1917, the New York legislature, in order to free the

22. _Commissioner Hindu Religious Endowments, Madras v. Sri Lakshmindra Tirtha Swamiar of Sri Shirur Mutt_, AIR 1954 SC 282, 290.
23. _Id._, at 291. See also _Ratilal Panachand Gandhi v. State of Bombay_, AIR 1954 SC 388, 391-2.
24. 344 US 94 (1952).

Russian Orthodox church in the United States from the atheistic and subversive influence of Soviet Russia, enacted a law[25] requiring that all the churches which were subject to the control of Russian Churches, be governed by the ecclesiastical body of the American separatist movement. The appellees, St. Nicholas Cathedral of the Russian Orthodox Church, a corporation created by the New York statute, claimed the possession and control of the Russian churches in America. The appellants who had been appointed as a representative of the church in Russia were in full control of the Russian churches in North America. The New York Court of Appeals having allowed the appellees to take control of the church, the appellants preferred an appeal before the United States Supreme Court. The Supreme Court, by an 8 to 1 judgment, reversed the opinion of the New York Court that the state could interfere in matters of administration and remanded the case to the New York Court. Reed, J., delivering the opinion of six judges, said:

> "Legislation that regulates church administration, the operation of the churches, the appointment of clergy, by requiring conformity to church statutes... prohibits the free exercise of religion."[26]

He held that even if the statute provided for the administra-

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25. Laws of New York 1925, Ch. 463. *Id.*, at 95.

26. *Id.*, at 107-8.

tion of the church in conformity with the established practice of that church.[27] the statute was unconstitutional. In his own words :

> 'Although this statute requires the New York churches to "in all other respects conform to, maintain and follow the faith, doctrine, ritual, communion, discipline, canon law, traditions and usages of the Eastern Confession (Eastern Orthodox or Greek Catholic Church)," their conformity is by legislative fiat and subject to legislative will.'[28]

Jackson, J., in his dissent,[29] said that the case was one in which the state interfered with the property rights of the holders of the church and not with the right to religious freedom. According to him there was nothing unconstitutional if the state statute laid down rules for the settlement of property rights of a church. The contrary view that the statute violated the religious freedom guaranteed by the Constitution was according to him so insubstantial that it deserved to be ignored.

When the case again came before the New York Court of Appeals on remand,[30] the Court held that according to the

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27. In India the Supreme Court readily upheld all statutes which required the statutory Boards to administer the religious institutions according to the traditions and usages of the denomination to which they belonged. See e.g., Tilkayat Shri Govindlalji Maharaj v. State of Rajasthan, AIR 1963 SC 1638, Raja Bira Kishore Deb, Hereditary Superintendent, Jagannath Temple, Puri v. The State of Orissa, AIR 1964 SC 1501.

28. John Kedroff v. Saint Nicholas Cathedral of the Russian Orthodox Church in North America, 344 US 94, 108(1952).

29. John Kedroff v. Saint Nicholas Cathedral of the Russian Orthodox Church in North America, 344 US 94, pp.126-132.

United States Supreme Court the state could not legislate to transfer the control of the church property. But the Court assumed that if it could be found that the church authorities were actually dominated by the Soviet state, the Courts could use their equitable power to exclude that authority's appointees[31] on the ground that such persons would not administer the trust property for the benefit of the faithful adherents of the church. The New York Court, therefore ordered a new trial to determine whether the central church authority was freely functioning or was merely a propaganda organ of the Soviet state.[32]

In sum, we find that the state in the United States does not usually interfere with the secular activities which might be associated with religious practices. By way of contrast in India, however, the state is authorised to regulate and control the secular activities of religious bodies. Moreover, the courts in India hold the view that the appointment of a statutory management board and the conduct of even daily worship under the supervision of such boards according

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30. St. Nicholas Cathedral v. Kedroff, 306 NY 38, 114 NE 2d 197 (1953) referred to in Note, Constitutional Limitations On State Court Review of Hierarchical Church Indicatory Decisions, 54 Col. L.Rev. 438 (1954).

31. The United States Supreme Court had said:
"Legislative power to punish subversive action cannot be doubted. If such action should be actually attempted by a cleric, neither his robe nor his pulpit would be a defence."
John Kedroff v. Saint Nicholas Cathedral of the Russian Orthodox Church in North America, 344 US 94, 109.

32. The order of the New York Court of Appeals for a new trial was objected on the ground that it was not warranted

to the customs of the temple is valid as the Constitution authorises the state to restrict the secular activities of religious practices. This might not be permitted in the United States. As shown by the _Kedroff_ case[33] the courts do not recognise the right of the state to interfere even with the secular administration of the church. Even where religious worship and administration have to be directed by the statutory Boards in accordance with the customs and usages of the established sect or sub-sect, the Indian courts have upheld the provisions while the American courts have not done so.

The problem of regulating economic and financial activities connected with religious practices was as we have seen raised in _Commissioner Hindu Religious Endowments, Madras_ v. _Sri Lakshmindra Tirth Swamiar of Sri Shirur Mutt._[34] The Attorney-General had contended before the Supreme Court that the government could regulate, under article 25(2)(a), "all secular activities, which may be associated with religion but do not really constitute an essential part of it."[35] It seems that he wanted to emphasize that all activities which involved the expenditure of funds or the employment of human agency were, _ipso facto_, secular activities and as such could be regulated by the state under article 25(2)(a). Mukherjea,

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by the judgment of the United States Supreme Court. See, Note, _Constitutional Limitations On State Court Review of Hierarchical Church Judicatory Decisions_, 54 Col. L.Rev. 435 (1954).

33. _John Kedroff v. Saint Nicholas Cathedral of the Russian Orthodox Church in North America_, 344 US 94 (1952).

34. AIR 1954 SC 282.

J., delivering the judgment of the Court, rejected this contention. He said that the determination of "essential" part of a religious practice was primarily to be ascertained according to the doctrines held by the particular religion which claimed that a certain practice was an essential attribute of its religion. To quote him again,

> "if the tenets of any religious sect of the Hindus prescribe that offerings of food should be given to the idol at particular hours of the day, that periodical ceremonies should be performed in a certain way at certain periods of the year or that there should be daily recital of sacred texts or oblations to the sacred fire all these would be regarded as parts of religion and the mere fact that they involve expenditure of money or employment of priests and servants or the use of marketable commodities would not make them secular activities partaking of a commercial or economic character; all of them are religious practices and should be regarded as matters of religion within the meaning of Art. 26(b)." 36

In the result some of the provisions of the impugned Act[37] were held violative of articles 19(1)(f) and 31 dealing with the property rights. It may be noted that article 25(2)(a) permitting the state to regulate secular activity associated with religious practice was not applied to adjudge the constitutionality of any of those provisions. Thus section 30(2) of the Act had provided that the surplus left after certain permitted expenditure could be spent by the Mahant only with the consent of the Commissioner or the Area Committee which might issue general or special instructions

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36. Ibid.

37. The Madras Hindu Religious and Charitable Endowments Act, 1951 (Madras Act 19 of 1951).

for the purpose. Further section 31 directed the Mahant to obtain previous sanction of the Deputy Commissioner for incurring expenditure out of a certain surplus. Both these sections dealt with the economic activities of religious institutions. These provisions could therefore come within the purview of article 25(2)(a). But the Supreme Court took them as infringements of the property rights of the Mahant and accordingly declared them violative of article 19(1)(f). Again, section 55 of the impugned Act which required the Mahant to render account for certain gifts made to him personally in his capacity as a Mahant was also held invalid under article 19(1)(f).

A number of other provisions of the Act were, however, held valid. Some of these provisions definitely regulated and restricted the economic and financial activities of the institution. For instance, section 20 empowered the Commissioner to pass orders to ensure that endowments were properly administered and their income was duly appropriated for the purposes for which they were meant. Again, section 27 imposed a duty on the trustees to furnish certain accounts to the Commissioner. Section 29 forbade alienation of immovable properties belonging to the trust without the sanction of the Commissioner except leases for a term not exceeding five years. Section 54 authorised the state government to approve the scale of expenditure of a religious

institution. All these sections dealing with the financial aspect of a religious institution were held valid but no reference was made to article 25(2)(a).[38]

Another case can be conveniently considered here. In Durgah Committee, Ajmer v. Syed Hussain Ali[39] the Union Parliament passed the Durgah Khawaja Saheb Act[40] to administer the Durgah and the endowment of the Durgah Khawaja Moinuddin Chisti at Ajmer to which Hindus as well as Muslims make offerings. The Act was challenged on the ground, amongst others, that it infringed the freedom of management of a denominational institution guaranteed by article 26(b). Sections 4 and 5 provided for the appointment of a Durgah Committee by the Central Government to administer, control and manage the Durgah endowment. The members of the committee to be nominated by the Government were to be Hanafi Muslims. Section 15 enjoined upon the Committee to observe Muslim law and tenets of the Chishti saint in conducting and regulating the established rites and ceremonies at the tomb. It was contended by Khadims of the tomb that the Act was invalid as it infringed their rights to

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38. "Nothing in this article shall affect the operation of any existing law or prevent the State from making any law regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice." Article 25(2)(a) of the Constitution of India.

39. AIR 1961 SC 1402.

40. Act 36 of 1955.

manage and administer the institution guaranteed under article 26(b), (c) and (d). The High Court of Rajasthan accepted the contention and declared several provisions of the enactment unconstitutional.[41] It took the view that the Government should not have been authorised to appoint the members of the committee consisting of the Hanafi Muslims without providing that they should be of the Chisti order having faith in the religious practices and rituals associated with the shrine. The provision for the appointment of the committee was, therefore, found to be ultra-vires. Similarly other provisions of the enactment relating to the privileges and functions of the Khadims, Sajjadanashin and Nazim were also declared violative of article 19 and 25 of the Constitution. On appeal the Supreme Court took a contrary view. It found all the provisions including the constitution of the Committee and the privileges of Khadims and others[42] constitutional.

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41. Syed Hussain Ali v. Durgah Committee, AIR 1959 Raj 177.

42. It may be noted that, in 1964 by an amendment to the Original Act, the Nazim, the Sajjadnashin and all other persons authorised to do any act under the Durgah Khawaja Saheb Act were designated as public servants within the meaning of section 21 of the Indian Penal Code. The Durgah Khawaja Saheb (Amendment) Act, 1964 (Act 20 of 1964), section 2.

The Court held that the Act merely regulated secular practices which were not an essential or an integral part of religion.[43]

In India, recently a large number of enactments both state and central have been passed primarily for the purpose of controlling the economic and financial aspect of religious institutions.[44] Though many of them were challenged before the courts but they were found valid on the ground that they regulated the secular practices of the institutions.

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43. Durgah Committee, Ajmer v. Syed Hussain Ali, AIR 1961 SC 1402, 1417.

44. E.g., The Bihar Hindu Religious Trusts Act, 1950 (Bihar Act 1 of 1951); The Bombay Public Trust Act, 1950 (Bombay Act 29 of 1950); The Madhya Pradesh Public Trusts Act, 1951 (MP Act 30 of 1951); The Orissa Hindu Religious Endowment Act, 1951 (Orissa Act II of 1952); The Travancore Cochin Hindu Religious Institutions Act, 1950; The Rajasthan Public Trusts Act, 1959 (Rajasthan Act 42 of 1959); The Madras Hindu Religious and Charitable Endowments Act, 1951 (Madras Act 19 of 1951); The Mussalman Waqf Act, 1923 (Act 42 of 1923); The Waqf Act, 1954 (Act 29 of 1954); The Bengal Waqf Act, 1934 (Bengal Act 13 of 1934); The Religious Endowments Act, 1863 (Act 20 of 1863); The Charitable Endowment Act, 1890 (Act 6 of 1890); The Charitable and Religious Trusts Act, 1920 (Act 14 of 1920); The Hyderabad Dastur-ul-amal Waqf Act; The Official Trustees Act, 1913 (Act 2 of 1913); The Indian Trustees Act, 1866 (Act 27 of 1866); The Indian Trusts Act, 1882 (Act 2 of 1882); The Religious Societies Act, 1880 (Act 1 of 1880); The Kazil Act, 1880 (Act 12 of 1880); and the Mussalman Waqf Validating Act, 1913 (Act 6 of 1913).

In the United States the state is not primarily concerned with the economic and financial activities of the church. The properties of the church are administered according to the wishes expressed specifically in the trust deed itself. If there is no express trust endowed property is administered according to the church laws or the internal rules of the church to which the property is endowed. In the absence of even such provisions the wishes of the followers of that church are regarded as controlling. In case of division of opinion among the followers, the wishes of the majority prevail.[45] They cannot, however, use the property of the trust for the support of a new and heretical doctrine.[46] In V.D. Mitchell v. Church of Christ at Mt. Olive[47] a state Supreme Court has even categorically held,

> "the majority of each independent or congregational society, however regular its actions or procedure may be, may not, as against a faithful minority, divert the property of the society to another denomination, or to the support of doctrines radically and fundamentally opposed to the characteristic doctrines of the society, even though the property is subject to no express trust."[48]

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45. John Watson v. William A. Jones, 80 US (13 Wall) 679 (1872).

46. Id., at 723.

47. 70 ALR 71 (Alabama S Ct 1930).

48. Id., at 74.

In America there are no acute problems as there are in India. Particularly in the fields of economic, financial and secular activities of religious bodies, the government seldom interferes. Everyone, whether an individual or an institution, is absolutely free to do whatever he or it likes and the state keeps aloof except in the rare cases where such freedom might cause harm to others or might endanger the safety of the country.

The reason for the difference between India and the United States is apparent. The state in India acts as the guardian and protector of religious institutions. It would, therefore, interfere with the affairs of such institutions in order to see that fraud, mismanagement and waste do not take place in them. The Constitution itself specifically provides for such a contingency. In the United States because of the establishment clause the state keeps itself away in the church administration. The Courts take jurisdiction only if a complaint is made by the adherants of the church themselves owing to some internal friction or trouble. There again the courts, under the Watson rule[49] would decide the case in accordance with the unanimous or majority view of the church members.

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49. John Watson v. William A. Jones, 80 US (13 Wall) 679 (1872). See supra p. 427, the text accompanying fn. 45.

Chapter XVII

Social Welfare and Reform

Religious practices sometimes come into conflict with other social interests. In India religion plays a vital role in the life of an individual. The law of husband and wife, parent and child, devolution and disposition of property depend on religion. In fact religion pervades and governs all domestic usages and social relations. In the United States the life of the people is not so much interwoven with religious practices though it is true they observe certain religious ceremonies and practices like baptism and attendance at church on Sundays. The Catholics want their children to be educated through a Catholic system of education and receive instruction in the doctrines of the Catholic church.[1] Jehovah's Witnesses exhibit a good deal of religious fanaticism and believe that it is their duty to spread their Lord's mission and even their children take part in religious propaganda.

This religious belief of some section of the society sometimes comes into clash with the state sponsored scheme of social welfare and reform or run counter to public health and morals of the community. In India, clause (2)(b) of article 25 empowers the state to make laws in respect

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1. For the relevent portions of the Canon law see, supra p.180, fn.98.

of social reform notwithstanding the freedom of religious practices guaranteed in the first clause of the article. Though there is no such provision in the United States, the courts there have thrown their weight on the side of social reform. There are, of course, some minor differences between the two countries because of their different social set up. As noted above in India the power of the legislature to regulate religious practices in order to achieve social welfare and reform has been expressly conferred by article 25 itself. A doubt has been raised that since article 25(2)(b) giving power to the state to interfere in matters of religion is prefixed by the word "social", the state is authorised to include only welfare schemes and reforms which can be characterised as social.[2] In Commissioner Hindu Religious Endowments, Madras v. Sri Lakshmindra Tirtha Swamiar of Sri Shirur Mutt[3] Mukherjea, J., had noted that the state could legislate in order to curb religious freedom under sub-clause (b) "for social welfare and reform even though by so doing it might interfere with religious practices." The difficulty arises because the import of "religious practice" is wide and is

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2. Subramanian, N.A. Freedom of Religion, 3 JILI 323, 331 (1961).

3. AIR 1954 SC 282.

capable of including some social practices. Whenever any religious practice is sought to be regulated by law, the orthodox section of the society raises all sorts of objections in the name of religious freedom. In such cases the courts have to balance the essential and obligatory features of a religious practice on the one hand and the social welfare and reform to be achieved by the law on the other hand. The courts have usually taken the view that if the legislature declares that a certain measure aims at social reform, they may not question such declaration. The Bombay High Court, in The State of Bombay v. Naragu Appa Mali[4] exactly took this attitude when it observed that the courts could not undertake the task as to what type of law was to be made for the welfare of the Community. Chagla, C.J., delivering the judgment, said:

> "A question has been raised as to whether it is for the legislature to decide what constitutes social reform.... They are responsible for the welfare of the State and it is for them to lay down the policy that the State should pursue. Therefore, it is for them to determine what legislation to put upon the statute book in order to advance the welfare of the State. If the Legislature in its wisdom has come to the conclusion that monogamy tends to the welfare of the State, then it is not for the Courts of law to sit in judgment upon that decision."[5]

Later, the same question arose in an Allahabad case.[6]

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4. AIR 1952 Bom 84.

5. Id., at 86-7.

6. Ram Prasad Seth v. State of Uttar Pradesh, AIR 1957 All 411.

Mehrotra, J., speaking for the Court argued:

> "It is well settled that in a democratic State legislature represents the will of the people... if the legislature as the law making authority regards a particular measure as a measure of social reform, the Courts should not say that it should not be regarded as a measure of social reform."[7]

The result is that in India religious practices are subject to social welfare and reform and if the legislature declares a particular legislation aiming at social reform, the courts would not ordinarily sit in judgment over it.

(i) Monogamy Legislations.

There has been a sharp difference of approach between the law and practice of marriage in India and the United States. While in India polygamy is sanctioned by religion of the two major communities namely, Hindus and Muslims, in the United States, as in the whole christian world, monogamy is the rule. At one time in the United States bigamous marriages were practised by the adherents of the church of Jesus Christ of Latter Day Saints, popularly known as Mormons' Church. They believed that plural marriage was not only permissible but obligatory on every member of it. But the courts found no difficulty in upholding the legislation which banned polygamy in the United

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7. *Id.*, at 414.

States.[8] For example, in *George Reynolds v. United States*[9] the Congress by statute[10] made it criminal to practise bigamy in any of the territories of the United States. The appellant in this case was prosecuted and convicted for practising bigamy. He claimed to be a member of the Mormons' Church according to which, as noted above, bigamy was obligatory on every member. Consequently, he claimed that the practice was valid on grounds of religious freedom guaranteed under the Constitution. The United States Supreme Court rejected the plea and upheld the conviction. It was of the opinion that the religious belief could not be accepted as a justification of an overt act made criminal by the law of the land. Waite, C.J., delivering the opinion of the Court, traced the history of polygamy and observed :

> "(Polygamy) has always been odious among the Northern and Western nations of Europe, and, until the establishment of the Mormon Church, was almost exclusively a feature of the life of Asiatic and of African people."[11]

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8. E.g., *George Reynolds v. United States*, 98 US 145(1878), *Samuel D. Davis v. H.G. Beason*, 133 US 333 (1890) and *The Late Corporation of Latter Day Saints v. United States*, 136 US 1 (1890).

9. 98 US 145 (1878).

10. Section 5352, United States Revised Statutes banning polygamy reads :
 "Every person having a husband or wife living, who marries another, whether married or single, in a Territory, or other place over which the United States have exclusive jurisdiction, is guilty of bigamy, and shall be punished by a fine of not more than $ 500, and by imprisonment for a term of not more than five years."

11. *George Reynolds v. United States*, 98 US 145, 164 (1878).

Tracing the history of polygamy he pointed out that in the United States it was always regarded as a crime to take more than one wife. If polygamy was allowed on religious grounds, he argued,

> "then those who do not make polygamy a part of their religious belief may be found guilty and punished, while those who do must be acquitted and go free."[12]

He illustrated the point by posing the question: Could human sacrifice and suttee system be validated on religious grounds? He answered the question in the negative and held that polygamy could be done away with by legislative action without making any exemption either on religious or on any other ground. Criticising the claim that plural marriages are allowed by religion, Waite, C.J., said :

> "So here, as a law of the organization of society under the exclusive dominion of the United States, it is provided that plural marriages shall not be allowed. Can a man excuse his practices to the contrary because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances."[13]

In another case reaching the American Supreme Court in 1890,[14] the appellant was convicted not because he had practised polygamy but merely because he was a member of the Mormons' Church which advocated plural marriages. The

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12. George Reynolds v. United States, 98 US 145, 166(1878).
13. Id., at 166-7.
14. Samuel D. Davis v. H.G. Beeson, 133 US 333 (1890).

public opinion against Mormons' practice of plural marriage in the United States was so bitter at that time that even its membership was declared illegal. The Supreme Court upheld the conviction and observed that the religious freedom guaranteed through the First Amendment could not be "invoked as a protection against legislation for the punishment of acts inimical to the peace, good order and morals of society.[15] In the opinion of the Court religious freedom could be regulated by the penal laws of the country. As to how plural marriages amount to be a crime the Court said:

> "Bigamy and polygamy are crimes by the laws of all civilized and Christian Countries. They are crimes by the laws of the United States, and they are crimes by the laws of Idaho. They tend to destroy the purity of the marriage relations, to disturb the peace of families, to degrade woman and to debase man. Few crimes are more pernicious to the best interests of society and receive more general or more deserved punishment... To call their advocacy a tenet of religion is to offend the common sense of mankind. If they are crimes, then to teach, advise and counsel their practice is to aid in their commission, and such teaching and counselling are themselves criminal and proper subjects of punishment, as aiding and abetting crime are in all other cases."[16]

The result of the decision of this case was that a membership of Mormons' Church itself became an offence. The

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15. Samuel D. Davis v. H.G. Beason, 133 US 333, 342 (1890).
16. Id., at 342.

same year, the Supreme Court upheld an act of the Congress[17] declaring the charter of the Mormons' Church void and forfeiting its property.[18] As the church continued to propagate its tenets including that of plural marriages despite the fact that such marriages were declared illegal, the Congress had to pass the law making the organisation itself unlawful and authorising the seizure of its property. The Court held that the object of the Act was to prevent the use of the funds for illegal and immoral purposes and therefore it was valid.

As a result of these cases, the Mormons' Church adopted, in 1890, the rule of monogamous marriage through a resolution passed that year. Since then, except in some individual cases,[19] there has been no violation of the monogamous marriage rule.

In India, at the time when the Constitution came into force in 1950, the majority of the people approved of plural marriages. Prior to 1956 there was no limit to the number of wives a Hindu might choose to keep.[20] According to the Muslim law a Mohamedan could have more than one wife at one time

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17. United States Revised Statutes, s. 1890, 'An Act to Punish and Prevent the Practice of Polygamy in the Territories of the United States', an Act of the Congress, passed in 1862.

18. <u>The Late Corporation of the Church of Jesus Christ of Latter-Day Saints v. United States</u>, 136 US 1 (1890).

19. See e.g., <u>Heber Kimball Cleveland v. United States of America</u>, 329 US 14 (1946).

20. Mulla, D.F., <u>Principles of Hindu Law</u> (1966, N.M.Tripathi, Bombay), s. 430 p. 465.

provided the number did not exceed four.[21] There is, however, a difference between the Mormons' claim and the Indian practice. According to the Mormons' Church it was obligatory for a member to have several wives while according to both Hindus and Muslims it was only permissible.

The step towards preventing polygamous marriages was first taken by some state governments in India. Bombay,[22] Madras,[23] and Saurashtra[24] states, made laws prohibiting bigamy among the Hindus.[25] It may be noted that the Indian Penal Code does not declare in categorical terms that the practice of polygamy is an offence. Section 494 of the Penal Code merely prescribes a punishment for those who, having a husband or wife living, marry in cases where such marriages are void by reason of their taking place during the subsis-

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21. It is worth noting that even if the number exceeds four, according to the Hanafi School of Sunni law the marriage with the excess number of wives is not void but only irregular and the children born thereof are legitimate. Mulla, D.F., *Principles of Mahomedan Law* (1968, Eastern Law House, Calcutta), pp. 251 & 256. According to Shias, temporary (Muta) marriages can be validly contracted with any number of women without limit. Baillie, Neil B.E., A Digest of Moohummudan Law (1887, Smith, Elder & Co. London), II, 28.

22. The Bombay Prevention of Hindu Bigamous Marriages Act, 1946(Bom. Act 25 of 1946).

23. The Madras Hindu (Bigamy Prevention and Divorce) Act, 1949(Mad. Act 6 of 1949).

24. The Saurashtra Prevention of Hindu Bigamous Marriages Act, 1950.

25. These Acts were repealed by the Hindu Marriage Act, 1955 (Act 25 of 1955) section 30.

tance of a former marriage. The provisions of the Code in this matter are, therefore, applicable only in those cases where personal law of the parties prohibits polygamy. As the religion of both Hindus and Muslims permitted polygamy, the provisions of the Code relating to bigamy did not apply them. In effect section 494 applied only to Christians living in India.[26] Subsequently, polygamy was prohibited amongst the Parsees,[27] and as noted above amongst Hindus, Buddhists, Jains and Sikhs[28] through different legislative enactments.[29] Its practice has, however, not been prohibited in the case of Muslims.[30] The Bombay and Madras enactments were resented by some Hindus. Cases were also filed before the High Courts of Bombay and Madras to get these enactments declared void

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26. Queen v. Paterson, 1 All 316 (1876). For Christians, bigamy is both a sin and a crime. See Gour, H.S., Penal Law of India (1965, Law Publishers, Allahabad), IV, 2551.

27. The Parsi Marriage and Divorce Act, 1936 (Act 3 of 1936 replacing the old Act 15 of 1865), section 5.

28. The Hindu Marriage Act 1955 (Act 25 of 1955) makes Monogamy a rule for all Hindus, Buddhists, Jains and Sikhs.

29. So also polygamy is not permitted if a marriage is contracted under the Special Marriage Act, 1954 (Act 43 of 1954 replacing Act 3 of 1872).

30. Gour, Hari Singh: The Penal Law of India, Vol. IV, 2551 (1964, Law Publishers, Allahabad).

on the ground of their infringement of religious freedom.[31-32] Both of them upheld the enactments.[33] Holding the impugned enactments as constitutional both the High Courts held that statutes prohibiting bigamy were passed in the interests of 'social welfare and reform'. It may be added that in the Madras case it was urged that in order to perform certain religious rites under Hindu Law a son was essential, and in case a person was issueless he should marry a second wife for the sake of begetting a son. The Court,

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31. The State of Bombay v. Narasu Appa Mali, AIR 1952 Bom 84; Srinivasa Aiyer v. Saraswathi Ammal, AIR 1952 Mad 193.

32. See also Nagabhushanam v. Nagendramma, AIR 1956 Andhra 181, where an unsuccessful attempt was also made to get the Madras Act declared invalid under article 254(1) of the Constitution as being repugnant to section 494 of the Indian Penal Code.

33. It is surprising to note that in the Narasu Appa case, the lower courts in Bombay were of the view that the legislation prohibiting bigamy was invalid. The Sessions Judge of South Satara, in appeal no. 231 of 1951, and the Magistrate, First Class, Kaira, in appeal no. 173 of 1951, had held that the legislation being invalid the accuseds were to be acquitted. See these facts in The State of Bombay v. Narasu Appa Mali, AIR 1952 Bom 84, at 85.

however, rejected this contention and observed that as the Hindu law recognised adoption of a son it was not essential to have a second wife for begetting a son. Thus a law prohibiting marriage during the life time of the wife could not be said to be bad. The matter did not end with the decisions of the Bombay and Madras High Courts. Subsequently, attempt was made to test the constitutionality of the Hindu Marriage Act of 1955.[34]

Thus in Ram Prasad Seth v. State of Uttar Pradesh[35] the validity of the prohibition of bigamy was challenged before the Allahabad High Court. In 1956 the Government of Uttar Pradesh laid down in its Government Service Rules that no servant of the state should contract a bigamous

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34. Ram Prasad Seth v. State of Uttar Pradesh, AIR 1957 All 411, special appeal dismissed AIR 1961 All 334 (DB), Haisnam Baruniton Singh v. Thokchom Ningol Haisnam Ongbi Bhani Devi, AIR 1959 Manipur 20. See also Channamma v. Dhalappa, AIR 1958 Mys 147.

35. AIR 1957 All 411.

marriage even if his law for the time being permitted him to do so. The petitioner, an engineer in the Public Works Department wanted to marry a second wife as he had no son surviving from the first wife. He sought permission from the state Government but it was refused. He applied for a Writ of mandamus commanding the state of Uttar Pradesh to dispose of his application in accordance with the Hindu Sastras, and not the provisions of the Hindu Marriage Act, which in so far as they inhibited his remarriage were in violation of his constitutional right to profess and practise his religion. His religion obliged him to marry again in the hope of obtaining a son. The Government Service Rule was in conflict with his religious belief and practice. But the Court following Madras and Bombay cases rejected the contentions and held that "the act of performing a second marriage in the presence of the first wife cannot be regarded as an integral part of Hindu religion." [36-37] It was also of the opinion that even if it could be regarded as a part

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36. Ram Prasad Seth v. State of Uttar Pradesh, AIR 1957 All 411, 414.

37. By this time the Supreme Court had declared that only essential religious practices were saved by article 25(1). Commissioner Hindu Religious Endowments, Madras v. Sri Lakshmindra Tirtha Swamiar of Sri Shirur Mutt, AIR 1954 SC 282.

of religion the enactment was valid as a social reform under article 25(2)(b). Mehrotra, J., concluding his judgment, said:

> "(T)he Act of performing a second marriage in the presence of the first wife cannot be regarded as an integral part of Hindu religion, nor can it be regarded as practising or professing or propagating Hindu religion which is protected under Art. 25 of the Constitution. Even if bigamy be regarded as an integral part of Hindu religion the impugned rule is protected under Art. 25(2)(b) of the Constitution."[38]

In Haisnam Boruniton Singh v. Thokchom Ningol Haisnam Ongbi Bhani Devi,[39] it was contended that in the state of Manipur the Hindu Marriage Act in so far as it prohibited polygamy was against social welfare and reform because in Manipur there was a preponderance of females over the male population and many women would remain unmarried. It was also pointed out that as these women would be prevented from satisfying their biological needs through lawful wedlock they might be tempted to lead immoral life. The result would be that the bigamy legislation would turn out to be an anti-social legislation and could not be justified under article 25(2)(b). But the Manipur High Court rejected this plea and held that the Hindu Marriage Act prohibiting bigamous marriage was valid as a measure of social reform. At any rate polygamy was not an essential part of Hindu religion.

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38. Ram Prasad Seth v. State of Uttar Pradesh, AIR 1957 All 411, 414. On appeal the judgment was affirmed by the Division Bench. Ram Prasad Seth v. State of Uttar Pradesh, AIR 1961 All 334.

39. AIR 1959 Manipur 20.

There is another aspect of the matter. In the United States divorce is easy and the system of successive marriages[40] is prevalent there.[41] In India in spite of divorce being permitted by the recent legislation[42] cases of divorce, particularly among the Hindus, are rare. Consequently, at present successive marriages is not widespread in India. Viewed strictly successive marriage is a form of polygamy and unless some steps are taken to prevent it, the day may be not far off when successive marriages might prevail among the Hindus as it is in the United States. The frequent divorces and successive marriages also create the problem of children born through different marriages as no proper care of these children could be expected from either the step-fathers or the step-mothers. These problems have already cropped up in the United States and they are unable to find any satisfactory solution for them.[43]

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40. The expression 'successive marriages' is used here in the sense that marriages take place one after another, after the dissolution of a former marriage.

41. For a critical study of the matter in the United States, see Bartholomew, G.W., Recognition of Polygamous Marriages in America, 13 Inter. & Comp. L.Q., 1022 (1964).

42. The Hindu Marriage Act 1955 (Act 25 of 1955). Other legislations permitting divorce are : The Special Marriage Act 1954 (Act 43 of 1954), the Matrimonial Causes (War Marriages) Act 1948 (Act 40 of 1948), the Indian Divorce Act, 1945 (9 Geo. VI, c.5), and the Converts Marriage Dissolution Act, 1866 (Act 21 of 1866).

43. Supra note 41.

Polygamy among Muslims:

As noted earlier, in India at present the practice of polygamy is sanctioned only amongst the Muslims who claim that it is a part of their religion based as it is on an ayat of the Quran enjoining that a Muslim might have at a time as many as four wives.[44] Though the Constitution has directed the state to secure a uniform civil code through out the territory of India,[45] the state has enacted family laws for Christians, Parsis, Hindus and others but not for the Muslims. In a number of Muslim countries the personal law of the Muslims has been codified and in most of them the practice of polygamy has either been prohibited or restricted. First attempt in this direction was made in Syria in 1953. There it was made a condition precedent for the husband desirous of marrying a second wife during the life of his first wife, to satisfy the court of his position and income and his capacity to maintain the woman whom he wanted to marry along with his existing wife.[46] "The court may withhold permission... (if) it is established that he is not in a position to support them both."[47] In 1957, Tunisia

44. *Infra* note 50.

45. "The state shall endeavour to secure for the citizens a uniform civil code through out the territory of India." Article 44 of the Constitution of India.

46. Article 17, *The Syrian Law of Personal Status*, 1953, See Anderson, J.N.D., *The Tunisian Law of Personal Status*, The Inter. & Comp. L.Q. VII (1958), p.262, 268.

47. Article 17, The Syrian Law of Personal Status, quoted in Anderson, J.N.D., *Islamic Law in the Modern World* (1959, Stevens & Sons, London), p. 49.

categorically declared:

"Polygamy is prohibited."[48-49]

This total prohibition was based on the ground that the Quran itself directs that an individual should have one wife unless he was confident of being capable of treating two or more wives with equal justice. The experience and the Quranic injunction[50] both make it clear that equality in treatment is in fact unattainable. In 1958, Morocco restricted polygamy if any injustice might arise between co-wives.[51] In 1961, Pakistan prohibited a man to take a second wife except with the previous permission of an Arbitration Council composed of two representatives one each of the husband and the wife,

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48. Section 18, The Tunisian Law of Personal Status, 1957, quoted ibid. See also, Anderson, J.N.D., The Tunisian Law of Personal Status, op. cit.

49. It may, however, be noted that though section 18 prohibited polygamy, a second marriage was not declared specifically as an impediment while certain other legal impediments were specifically mentioned in section 21 of the Tunisian Law of Personal Status, 1957.

50. While allowing polygamy the Quran says:
"If you fear that you shall not be able to deal justly with the orphans, marry women of your choice - two, or three, or four; but if you fear that you shall not be able to deal justly (with them), then only one... that will be more suitable to prevent you from doing injustice."
(Quran IV, 3). At another place admitting that impartiality is not possible, the Quran says:
"You are never able to be fair and just as between women even if it is your ardent desire... "
(Quran IV, 129).

51. Article 30 of the Moroccan Code of Personal Status, 1958 provides that "if any injustice is to be feared between co-wives, polygamy is not permitted."

and an official as a chairman.[52] Iran has also abolished polygamy and concubinage in 1967.[53]

While all these Muslim countries have either abolished or restricted polygamy, the question naturally arises why India should not lay down a uniform civil code as required by the Constitution which could apply to all the persons including Muslims.[54] Shri A.K. Sen when he was the Union Law Minister was of the opinion that the initiative for reform in the Muslim laws should come from that community, because it was "not the policy of the Government to place itself in the position of initiator in regard to minority communities."[55] Shri G.S. Pathak, who was also Union Law

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52. Section 6 of the Muslim Family Laws Ordinance, 1961 (Pakistan Ordinance No.8 of 1961) says:
"No man, during the subsistance of an existing marriage, shall, except with the previous permission in writing of the Arbitration Council, contract another marriage nor shall any such marriage contracted without such permission be registered under this Ordinance."

53. The Indian Express, September 11, 1967. Referred to in Hussain, M. Basheer, The Position of Women in Anglo Muhammadan Law of India, The Need for Reform, Souvenir of the Indian Federation of Women Lawyers, June 1968, 1,2.

54. Mrs. P.Phillips, President of the All India Women's Conference pleading for a uniform civil code says:
"(T)here should be a uniform Civil Code - the same laws for all men and women of every community and group. This is essential if there is to be national integration. No law whether it relates to marriage or inheritance should be different for different communities or different sexes. Justice must be above differences."
Phillips, P., The Women's Rights Day, Northern India Patrika, April 11, 1969, p.8.

55. Speech in the Rajya Sabha, May 20, 1963.

Minister held the same view. Speaking in the Lok Sabha he reasoned that since the personal laws of Muslims are mixed up with religion, it was not possible to "coerce people to accept views about their religion and custom."[56] In 1963 the Government had proposed to appoint a committee of Muslims to consider changes made in Muslim countries and to suggest reforms necessary in this country. But the proposal was dropped owing to the opposition from several Muslims organisations.[57]

Some reasons have been given in support of polygamy. It is a safeguard against the maladjustment in domestic life. In times of war the male population may considerably decrease. If this happens the problem of orphans and widows may arise.[58] Polygamy may in these circumstances be justified

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56. Speech in the Lok Sabha, May 17, 1966.

57. Hussain, M. Basheer, op. cit., p.3.

58. Even the Ayat, on which polygamy is claimed (Quran IV, 3) was revealed only after the battle of Uhuda when about 70 followers of the prophet had died in a religious battle and the prophet had to solve the problem of orphans and widows. See comments on Holy Quran (Hindi translation) by Mohd. Farooq Khan, (1966, Maqtaba, Al-Hasnat, Rampur), p.76.

as a method of preserving human race.[59] Some persons also justify polygamy by pointing out that in cases where a person has no offspring from the first wife it is permissible to have a second wife. It is also said that polygamy is necessary as the female population is on the increase.[60]

But when we examine these arguments closely, we find that none of them is convincing. In cases arising on the Hindu Marriage Act, referred to above,[61] most of these arguments in favour of polygamy were urged by certain sections of Hindus, but the courts found them all untenable and declared the monogamy legislation constitutional as a device of social welfare and reform. The opinion expressed by the courts in favour of monogamy are equally applicable in the case of Muslims as well. In Ram Prasad Seth v. State of Uttar Pradesh, Mehrotra, J., had said:[62]

> "(T)he marriage is a social institution and it may for the welfare of the State to control such an institution and to bring about measures of reforms which the

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59. Qadri, Anwar Ahmad, Islamic Jurisprudence in the Modern World, (1963 N.M. Tripathi, Bombay), p.185.

60. See, e.g., Sayeed Khan, Muslim Polygamy, Northern India Patrika, Nov. 7, 1968, p.4.

61. Supra notes 51 and 54.

62. AIR 1957 All 411, 414.

legislature's wisdom thinks proper to do in the interest of the State."63

Writing long ago Ameer Ali said:

"(T)he conviction is gradually forcing itself on all sides, in all Moslem communities, that polygamy is as much opposed to the Islamic laws as it is to the general progress of civilized society and true culture. In consequence of this conviction a large and growing section of Islamists regard the practice of polygamy as positively unlawful."64

Motazalas, a shia sect,[65] had declared in spite of stiff opposition,[66] in the third century of the era of Hegira[67] that Qoran inculcated monogamy.[68] However, in absence of any case in which monogamy was claimed by the Motazalas, it is doubtful if in India it was ever enforced on the basis

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63. Cf.:

"Even assuming that polygamy is a recognised institution..., the right of the State to legislate on questions relating to marriage cannot be disputed. Marriage is undoubtedly a social institution in which the State is vitally interested."

<u>The State of Bombay v. Narasu Appa Mali</u>, AIR 1952 Bom 84.

64. Ameer Ali, <u>Mahommedan Law</u>, (Tagore Law Lectures, 1884), (1908, Thacker, Spink & Co., Calcutta), II, 24. See also Wilson, Anglo Moohummudan Law (1908, Thacker & Co., London), pp. 467-69.

65. Mulla, D.F., <u>Principles of Mahomedan Law</u>, (1968, Eastern Law House, Calcutta), p. XX.

66. Ameer Ali states that one of the Motazalite preacher was persecuted for teaching monogamy by Al-Mamum. Ameer Ali, <u>op. cit.</u>, p.24.

67. About 9th Century A.D.

68. Ameer Ali, <u>op. cit.</u>

of custom. However, since the enactment of the Muslim Personal Law (Shariat) Application Act, 1937[69] it should be deemed that even if there had been any custom recognising monogamy amongst the Motazalas, it must have abrogated in the face of the well recognised practice of polygamy among the Muslims.[70]

The enlightened section of the Muslim community has now come forward asking for a reasonable restriction on the practice of polygamy. Professor A.A.A. Fyzee asserts that polygamy is not a fundamental right of the Muslims and as such its prohibition would not violate article 25 of the Indian Constitution.[71] Professor M. Basheer Hussain, advocating for reform in Muslim law says :

> "It is unfortunate that the Government of India which played such an important role in reforming the Hindu Law has allowed itself to be guided by Muslim orthodoxy in the matter of reforming the personal laws of the Muslims. Excessive fear of hurting the susceptibilities of the

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69. Act 26 of 1937.

70. Section 2 of the Act expressly provided that "notwithstanding any custom or usage to the contrary, in all questions.... including.... marriage dissolution of marriage, including talaq.... the rule of decision in cases where the parties are Muslims shall be the Muslim Personal Law (Shariat)." It may be noted that Motazalas, not only recognised monogamy, they believed that a talak divorce was not valid without the sanction of a judge. Ameer Ali, op. cit., p.511.

71. Fyzee, A.A.A., Outlines of Muhammadan Law, (1964, Oxford University Press, London), p.203.

> Muslims might have contributed to the apathy of the majority community: .... (The) failure.... in not initiating the reforms.... is bound to retard the progress of this community. The fear that such reforms would offend the feelings of the minority community is an unjustified fear."[72]

Others have also strongly pleaded for the abolition of polygamy.[73] Hidayatullah, C.J., in his introduction to Mulla's "Principles of Mahomedan Law" while mentioning the reforms made by several Islamic countries, is of the view that reform in the Muslim personal law is not impossible. He says :

> "It is however, amply clear that reform is not impossible. If the injunctions of the Koran and Hadis are not lost sight of, it is possible to make changes by legislation in a widening area. The latterday writers like Ameer Ali, Iqbal and reformers like Muhammad Abduh maintain the possibility of reform. The lead is coming from Muslim countries and it is to be hoped that in course of time the same measures will be introduced in India also." 74

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72. Hussain, M. Basheer, op. cit., supra n.53 p.4.

73. Gajendragadkar, P.B., Religion has no Voice in Indian Democracy, Northern India Patrika, December 16, 1968, p.7; Subba Rao, Separation of Religious, Secular Activities not Implemented, Northern India Patrika, December 16, 1968, p.7; Hussain, Saad Jaffer, Legal Modernism in Islam: Polygamy and Repudiation, 7 JILI 384, (1965); Nigam, R.C., A Plea for a Uniform Law of Divorce, 5 JILI 47 (1963); Rao, P. Kodanda, Muslim Polygamy and Divorce, Northern India Patrika, Oct. 22, 1968, p.4.

74. Mulla, op. cit., Introduction by Hidayatullah, C.J., p. xi, xxxi.

It may be noted that the Tunisian Prime Minister while declaring the prohibition of polygamy, had said in 1956:

> "polygamy ha(d) become inadmissible in the twentieth century and inconceivable by any right-minded person."[75]

In *Samuel D. Davis v. H.G. Benson*,[76] Waite, C.J., while criticising the practice of bigamy, was of the view that bigamy is a crime in any civilized society. According to him bigamous marriages,

> "tend to destroy the purity of the marriage relations, to degrade woman and to debase man.... To call their advocacy a tenet of religion is to offend the common sense of mankind."[77]

It is therefore submitted that it would be in the interests of the Muslims that polygamy as a rule be prohibited. If the Muslim countries can do that, it should not be difficult for a secular country like India to do the same. If the United States, where there is an establishment clause, could abolish polygamy, we can do so more easily since there is no establishment clause in the Indian Constitution. While a large number of other practices

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75. Broadcast talk of Shri Habib Bu Rugayba, Prime Minister of Tunisia, August 10, 1956, quoted in Anderson, J.N.D. *The Tunisian Law of Personal Status*, op. cit., p.289.

76. 133 US 333 (1890).

77. *Id.*, at 342.

supported by the revelations of Quran have either been prohibited or modified to a large extent,[78] there should not be any difficulty in this direction. As pointed out by Professor Fyzee,[79] Muslim law is not an heteronomours, immutable or irrational system but its enduring merit lies in its capacity to adjust to the changing human society and the needs of life, provided its religious basis is placed and understood in its correct perspective. It is well established that the sources of Muslim law are not only the Quranic precepts, but they include legal devices such as *ijma*, the consensus of the jurists, *Qiyas*, the analogical deductions, *istihasan*, the juristic equity, *istishalah*, the public good, *ijtihad*, independent reasoning, and *fatwas*, the opinions of jurists. The list does also include legislation. Since the Umayyad Dynasty came into power in 40 A.H. (661 A.D), the muslim rulers have purused a secular policy (Siassa Madania) as opposed to the policy of divine origin (Siassa Sharia).[80] With the growing

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78. For example, the institution of slavery, the rules of evidence, and procedure, the laws relating to crimes, torts, contract, and transfer of properties by way of sale, mortgage and lease etc.

79. Fyzee, *op. cit.*, at p.ix.

80. Saba Habachy, *Islam: Factors of Stability and Change*, 54 Col. L.Rev. 710, 717-8 (1954).

human needs, it becomes necessary to keep the Muslim law also in line with other systems by making necessary alteration to give effect to the needs of social welfare and reform. Professor Saba Habachy, in an Article, says:

> "(T)he right path for the orthodox community is to keep the force of conservatism and the forces of progressiveness in equilibrium. Both are necessary for the preservation and continuity of Islam and its law. Without the former, Islam would lose its character and succumb to dangerous heresies; without the latter, it would lose touch with the changing conditions of life."[81]

In 1930 a Tunisian Muslim socialist reformer, Tahir al-Haddad, had suggested that the laws of the Quran should not be regarded as final and unalterable, but open to evolutionary growth. According to him "the spirit of Islamic culture demands a continual process of adaptation of their specific prescriptions to the development of civilization."[82]

To sum up, it is submitted that polygamy may be prohibited among the Muslims as it has been done in cases

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81. Saba Habachy, *ibid*, at 712.

82. Gibb, *Modern Trends in Islam*, 98 (1947), quoted *ibid*, at 716.

of the followers of other religions. In order to avoid any hardship it may be provided that a second marriage may be solemnised if the husband could satisfy the court that there is sufficient reason for the same. In all such cases, however, the wife should be made a necessary party.

(iii) Excommunication.

In India, excommunication as a weapon of caste discipline has remained in full force. The person, who is excommunicated, is socially degraded in the eyes of his fellow castemen and does not feel easy in his daily social life. Originally, as a means of social reform, section 9 of Regulation VII of 1832 of the Bengal Code provided, inter alia, that the laws of Hindus and Muslims should not be permitted to operate so as to deprive the parties of any property to which, but for the operation of such laws, they would have been entitled.[83] These provisions were subsequently incorporated in the Caste Disabilities Removal Act, 1850. This Act provides that a person shall not be deprived of his proprietary rights by reason of his renouncing, or being excluded from, the communion of any religion or being deprived of caste, and that any such

83. See the Preamble of the Caste Disabilities Removal Act, 1850 (Act 21 of 1850).

forfeiture shall not be enforced as a law in the court.[84] It shows that this Act had in a way given effect to the modern notions of individual freedom to choose one's way of life and had removed with all those undue and outmoded interferences with the liberty of conscience, faith and belief which existed in the past. The main object of this enactment was to ensure and maintain human dignity and remove all those restrictions which prevented a person from living his own way of life so long as he did not interfere with the similar rights of others.

In recent times the question of excommunication has been considered in a number of cases connected with the power of the Head of the Dawoodi Bohra community. In 1948, the question was decided by the Privy Council in a case brought before it by an excommunicated member of the community.[85] Holding that the persons alleged to have been excommunicated had not been validly expelled from the community by the head, the Privy Council conceded that the

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84. Section 1 of the Act reads :
"So much of any law or usage now in force within India as inflicts on any person forfeiture of rights or property, or may be held in any way to impair or affect any right of inheritance, by reason of his or her renouncing, or having been excluded from the communion of, any religion, or being deprived of caste, shall cease to be enforced as law in any court."

85. Hasanali v. Mansoorali, AIR 1948 PC 66.

head of the Dawoodi Bohra community was entitled to excommunicate any member of his community. It was further held that the power to excommunicate was not 'absolute, arbitrary and untrammelled'[86] but subject to certain conditions and limitations.

In 1949 in the old Bombay state excommunication for any offence by any caste-tribunal was prohibited by the Bombay Prevention of Excommunication Act.[87] "Excommunication" was defined in the Act as meaning "the expulsion of a person from any community of which he is a member depriving him of rights and privileges which are legally enforceable by a suit of Civil nature...."[88] The explanation to the definition laid down that the rights and privileges within the meaning of the definition included the right to office or property or to worship in any religious place or a right of burial or cremation, notwithstanding the fact that the determination of such rights depended entirely on the religious rites or ceremonies or rule or usage prevalent in a community.[89] Section 3 of the Act declared excommunication illegal and of no effect, notwithstanding any law, custom or usage to the contrary. Section 4 imposed a fine upto

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86. Hasanali v. Mansoorali, AIR 1948 PC 66, 72.

87. Bombay Act 42 of 1949.

88. Id., section 2(4). Sardar Syedna Taher Saifuddin Saheb v. State of Bombay, AIR 1962 SC 853, 860.

89. Ibid.

Rs. 1000 on all persons who attempted to excommunicate any one. It was further provided that all those persons who voted in favour of a decision of excommunication at a meeting of a body or an association of a particular denomination would also be punished.

In Sardar Syedna Taher Saifuddin v. Tyebbhai Moosaji Koicha,[90] a member of the Dawoodi Bohra community who had been excommunicated by the Head of that community by two orders, one passed in 1934 and the other in 1948 soon after the judgment of the Privy Council referred to above,[91] challenged both these orders as invalid under the Bombay Act.[92] The Dai-ul-Mutlaq, or commonly called the Dai, the head of that community, defended his power of excommunication and challenged the validity of the Bombay Act itself on the ground that it was ultravires articles 25 and 26 of the Constitution. The Bombay High Court, however, upheld the validity of the enactment holding that the framing of the Act was such that exclusion of an excommunicated person from temples or from religious worship was not prevented by it, for the Act sought only to prevent and render void expulsions which deprived a person of rights and privileges which he was

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90. AIR 1953 Bom 183.

91. Hasanali v. Mansoorali, AIR 1948 PC 66, supra note 85.

92. The Bombay Prevention of Excommunication Act, 1949 (Bombay Act 42 of 1949).

formerly entitled to enforce by a suit of a civil nature. It was urged before the Court that the Act was invalidated by the coming into force of the Constitution, which by article 25 provided for freedom of conscience, and of profession, practice and propagation of religion, and by article 26 which provided the rights of a religious denomination to manage its own affairs in matters of religion. Chagla, C.J., speaking for the Bombay High Court upheld the validity of the Act and said that the right to excommunicate a member of a community was not a part of religious faith and belief. At best, it could only be a religious practice, and if in the opinion of the Legislature such a religious practice ran counter to a policy of social welfare, the legislation must prevail against the practice.[93] As to article 26, the Chief Justice said :

> "To manage its own affairs in matters of religion can only mean that in domestic matters of a religious denomination, where those are concerned with questions of religion, the Legislature cannot interfere unless the denomination is managing its affairs in such a way as to interfere with public order, morality and health. But when a religious denomination seeks to deprive a member of his legal rights and privileges, it is doing much more than managing its own affairs."[94]

Moreover, the Court held that the Act being a legislation of social reform was saved by article 25(2)(b). An appeal from

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93. Sardar Syedna Taher Saifuddin v. Tyebbhai Moosaji Koicha, AIR 1953 Bom 183, 187-8.

94. Id., at 188.

the said judgment to the Supreme Court abated owing to the death of the plaintiff.

The question again came up before the Supreme Court in another case filed by the Dai-ul-Mutlaq as a head of the Dawoodi Bohra community where he challenged the Bombay Act as infringing article 26(b) which gives a denomination the right to manage its own affairs in matters of religion.[95] The Supreme Court was divided in its opinion. While Sinha, C.J., concurred with the opinion expressed by the Bombay High Court in the earlier case, Sardar Syedna Taher Saifuddin v. Tyebbhai Moosaji Koicha,[96] referred to above, Das Gupta, Sarkar, Mudholkar and Ayyangar, JJ., held that the Act in so far as it destroyed the right of the Dai-ul-Mutlaq of excommunicating any member of his community was void being in violation of article 26(b) of the Constitution. Sinha, C.J., noted his dissent that the Constitution had given freedom of conscience to every one and no one could "be compelled, against his own judgment and belief, to hold any particular creed or follow a set of religious practices"[97] on pain of penalty, like excommunication. A person is not liable to answer for the veracity of his religious views,

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95. Sardar Syedna Taher Saifuddin Saheb v. State of Bombay, AIR 1962 SC 853.

96. AIR 1953 Bom 183.

97. Sardar Syedna Taher Saifuddin Saheb v. State of Bombay, AIR 1962 SC 853, 863 (per dissenting opinion of Sinha, C.J.).

and he could not be questioned as to his religious beliefs by the state or by any other person. According to him as the result of excommunication would be not only to exclude a person from common religious practices but also from his secular rights connected with the property owned by the denomination, the prohibition of excommunication should be viewed as a piece of social reform. The Act was intended to do away with the odious belief of treating a human being as a pariah, and of depriving him of his human dignity and his right to follow the dictates of his conscience. The Chief Justice added that the Act could also be saved under article 26(d). The Head of a denomination had to administer the property of the denomination under article 26(d) in accordance with law. The impugned enactment was a law within the meaning of article 26(d). The Act had put a check upon the petitioner, the head of the denomination, from withholding the civil rights of a member of the community to a communal property. Moreover, since there was a possibility that an excommunicated member might be treated as an outcaste and perhaps an untouchable by members of his community, a practice prohibited by article 17, the prohibition of excommunication could not be treated as unconstitutional.[98]

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98. Sardar Syedna Taher Saifuddin Saheb v. State of Bombay, AIR 1962 SC 853, 866.

Das Gupta, J., who delivered the majority opinion while elaborating the meaning and purpose of excommunication quoted with approval Professor Haseltine as follows :

> "Excommunication in one or another of the several different meanings of the term has always and in all civilizations been one of the principal means of maintaining discipline within religious organizations and hence of preserving and strengthening their solidarity."[99]

In canon law, he said, excommunication might be inflicted as a punishment for heresy, apostasy or schism. As a matter of fact, he found that unquestioning faith in the Dai, as the head of the community was part of the creed of the Dawoodi Bohras. At the time of initiation, every member of the community takes an oath of unquestioning faith in and loyalty to the Dai. He argued:

> "What appears to be clear is that where an excommunication is itself based on religious grounds such as lapse from the orthodox religious creed or doctrine (similar to what is considered heresy, apostasy or schism under the canon law) or breach of some practice considered as an essential part of religion by the Dawoodi Bohras in general, excommunication cannot but be held to be for the purpose of maintaining the strength of the religion. It necessarily follows that the exercise of this power of excommunication on religious grounds forms part of the management of the community through its religious head "of its own affairs in matters of religion."[100]

As the Act even made such excommunication invalid, he

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99. The article published in the Encyclopaedia of the Social Sciences. Sardar Syedna Taher Saifuddin Saheb v. State of Bombay, AIR 1962 SC 853, 868.

100. Id., at 869.

concluded that it interfered with the right of the community guaranteed under article 26(b) of the Constitution. Referring to the argument that the prohibition of excommunication was at any rate saved by article 25(2)(b) as a social welfare and reform,[101] he argued:

> "The mere fact that certain civil rights which might be lost by members of the Dawoodi Bohra community as a result of excommunication even though made on religious grounds and the Act prevents such loss, does not offer sufficient basis for a conclusion that it is a law 'providing for social welfare and reform'."[102]

Explaining his point, he said that while prohibition of an excommunication on a mere religious ground did not come within the purview of social welfare and reform, but if it was exercised on other grounds, for example, on the breach of some obnoxious social rule or practice, it might be a measure of social welfare and reform. Since the Act invalidated excommunication on any ground, including religious grounds, he concluded that it must be held to be a clear violation of the right of the Dawoodi Bohra community under article 26(b) of the Constitution to manage its own affairs in matters of religion.

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101. The learned judge was conscious of the earlier Supreme Court case, Sri Venkataramana Devaru v. State of Mysore, AIR 1958 SC 255 and agreed that article 26(b) was subject to article 25(2)(b).

102. Sardar Syedna Taher Saifuddin Saheb v. State of Bombay, AIR 1962 SC 853, 870.

Ayyangar, J., in his concurring opinion, added:

"(T)he position of the Dai-ul-Mutlaq, is an essential part of the creed of the Dawoodi Bohra sect. Faith in his spiritual mission and in the efficacy of his ministration is one of the bonds that hold the community together as a unit. The power of excommunication is vested in him for the purpose of enforcing discipline and keep the denomination together as an entity. The purity of the fellowship is secured by the removal of persons who had rendered themselves unfit and unsuitable for membership of the sect. The power of excommunication for the purpose of ensuring the preservation of the community, has therefore prime significance in the religious life of every member of the group."[103]

He argued that a legislation providing for social welfare and reform should be one which did not invade the basic and essential practices of religion guaranteed by the operative portion of article 26(1). In the instant case as the impugned legislation interfered with this basic principles of a religious denomination, it was not saved as social welfare and reform. On the point that the result of excommunication was to deprive a person of his civil rights, he argued that the property in which an excommunicated member claimed a right actually belonged to the

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103. Id., at 876.

community. If a member was excommunicated, he simply ceased to be a member of the community and could not enjoy the rights and privileges of the membership.

The majority judgment is open to criticism. The head of the community is not only a religious head but has also a right to control the properties of the denomination, including the right of worship and the right of burial. The result of excommunication is to take away from the excommunicated member all these rights. The past history of the Dawoodi Bohra community shows that though it seeks unquestionable faith in its head, the headship, itself, was disputed several times in the past.[104] In modern times in a free country it is not demanded that a person should submit himself to an unquestionable faith in another human being. But here the moment a doubt is raised about his loyalty to the head he stands in the danger of being excommunicated from the community. The question naturally arises, can

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104. On the death of the 26th Dai schism took place. Two different persons, Suleman and Daudbin-Kutabshah, claimed to be the 27th Dai, as a result of which two sub-sects came into existence. So also on the death of the 46th Dai, in 1840, a dispute arose as to the headship. Since then the appointment of subsequent heads has been disputed. It is also reported that 46th Dai, Badruddin had died of poison. See Hasanali v. Mansoorali, AIR 1948 PC 66, 67-8.

a person be declared excommunicated on the sole ground that he has no faith in the head of the community and in the policies adopted by him. Moreover, what are the effects of an excommunication? The expelled member loses the privilege to join the worship with other members of the community.

The majority opinion holds that excommunication is a "matter of religion" protected by article 26(b) and that it is not a matter of social welfare and reform. Both these points are open to objection. Is excommunication a pure matter of religion? No doubt a person may be excommunicated for heresy, apostasy or schism. But what would be the effect? The institution might possess valuable property or money contributed by the members of the community. The expelled member is excluded from its enjoyment. According to Ayyangar, J.,

> "the property belongs to a community and if a person by excommunication ceased to be a member of that community it is a little difficult to see how his right to the enjoyment of the denominational property could be divorced from the religious practice which resulted in his ceasing to be a member of the community."[105]

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105. Sardar Syedna Taher Saifuddin Saheb v. State of Bombay, AIR 1962 SC 853, 873.

It is difficult to accept this argument. In order to retain his rights to the use of the community property he has to submit to an unquestionable faith in the head, otherwise he would forfeit his claim to its use. In 1947, when the Privy Council recognised the power of the head, the Constitution had not come into force. Since the adoption of the Constitution in 1950 every person enjoys the constitutional right of freedom of conscience which would be rendered nugatory if a person were required to subscribe to unquestionable faith in another human being on pain of deprivation of civil right. Commenting upon the majority judgment, Prof. P.K. Tripathi says :

> "(T)he Court here has not even addressed itself to the most sensitive issue involved in the case, namely, that of balancing the freedom of the individual against the rights of the denomination.... Is it the philosophy of the Constitution of India that a citizen of this country should be compelled on pain of deprivation of civil rights such as the right of securing a place of burial for himself and for his progeny in the vicinity of the graves of his forefathers - to subscribe to "unquestionable faith" in another person, especially one about whose religious right to act as the representative of the Imam his conscience is skeptic? Does article 26(b) require the state to establish the religion of the Dai against the conscience and the wishes of those in the Dawoodi Bohra community who have no faith in him?"[106]

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106. Tripathi, P.K., Secularism: Constitutional Provision and Judicial Review, 8 JILI, 1, 17-8 (1966).

Moreover, the system of polygamy, human sacrifice, Suttee, Devadasi, Diwali gambling, untouchability, cow-sacrifice during Bakr-Id festival, are all matters of religion. Can they be permitted as a part of religious freedom of a denomination? In a large measure they have been prohibited or regulated by legislative enactments. Such enactments are, undoubtedly, measures of social welfare and reform and no religious denomination should have a right to challenge a legislation aiming at social reform on the ground of the violation of the right guaranteed in article 26(b), "to manage its own affairs in matters of religion." Excommunication was prohibited by the Bombay Act[107] as a means of social welfare and reform, as is evidenced by its preamble[108] which reads that excommunication "results in the deprivation of legitimate rights and privileges" of an excommunicated member. Surely the legislature took the step "in keeping with

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107. The Bombay Prevention of Excommunication Act, 1949 (Bombay Act 42 of 1949).

108. "Whereas it has come to the notice of Government that the practice prevailing in certain communities of excommunicating its members is often followed in a manner which results in the deprivation of legitimate rights and privileges of its members;

"And whereas in keeping with the spirit of changing times and in the public interest, it is expedient to stop the practice;..."

<u>Sardar Syedna Taher Saifuddin Saheb</u> v. <u>State of Bombay</u>, AIR 1962 SC 853, 871.

spirit of changing times and in the public interest."[109] As pointed out by Sinha, C.J., the Act is a culmination of the history of social reform "which began in 1832."[110] What actually happens when a person is excommunicated? Clearly he is deprived of his civil rights. The Bombay Act, it seems, was enacted only to further the aims and objects of the Caste Disabilities Removal Act[111-112] in accordance with the "modern notions of individual freedom to choose one's way of life and to do away with all those undue and outmoded interferences with liberty of conscience, faith and belief."[113]

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109. Ibid.

110. Id., at 860. See supra p.455.

111. Act 21 of 1850.

112. In 1873, Jackson, J., in Kerry Kolitany v. Moneeram Kolita, 19 Suth WR 367, 401, 406 (1873)(FB), laid down the scope of the Act as follows :

> "The Act provides for the cases of those who (1) have renounced, or (2) have been excluded from the communion of any religion, or (3) have been deprived of caste - meaning, I conceive, those who by their own choice, or by the action of their caste fellows, have been finally shut out, or temporarily deprived, though capable of being restored on the making of proper expiation."

113. Sardar Syedna Taher Saifuddin Saheb v. State of Bombay, AIR 1962 SC 853, 860-1 (Per Sinha, C.J.).

In the United States the practice seems to be that if the question is one of faith only, the Church is free to expel any of its members.[114] But where a civil right or a property right of an adherent is involved the law courts have jurisdiction.[115] In a case[116] before the Kentucky Supreme Court, Logan, J., speaking for the Court, held that even if the church officers or members had been irregularly removed or excluded from the church by the congregation, the civil courts had no power to determine whether the church, acting through its congregation, had acted justly or unjustly, regularly or irregularly. So also in John Watson v. William A. Jones,[117] the United States Supreme Court formulated a

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114. See Annotation, Determination by the Courts of Property Rights Between Contending Factions of an Independent or Congregational Church, 70 ALR 75, 75-6.

115. Logan, J., in Thomas v. Lewis (224 Ky 307, 6 SW 2d 255, annot. 70 ALR 75, 76, 1928) summarised the rules governing these matters as follows :

"The church has no control over any civil right or duty, while, on the other hand, the civil power has no authority to secularize the church, or to interfere with the exercise of its constitutional jurisdiction.... The church alone has jurisdiction of communion, faith, or discipline, and the members must submit to such rules and regulations governing these matters as may be prescribed by their church, but the church does not always have exclusive jurisdiction over property or personal liberty, or over any right which it is the duty of the civil power to protect.... When a question arises involving the right to use property belonging to a church or the ownership of such property, the jurisdiction of civil courts may be invoked to determine property rights."

116. Thomas v. Lewis, 224 Ky 307, 6 SW 2d 255 annot. 70 ALR 75, 76 (1928).

117. 80 US (13 Wall) 679 (1872).

rule that in case of disputes over church properties, generated by questions of faith, doctrine or ecclesiastical administration, the decision of the church's policy would be conclusive upon the civil courts. In a discussion on the Russian Orthodox Church case,[118] it has been suggested that as religious freedom has been guaranteed to the individual as well as to an organised church, "those who do not wish to be bound by the decisions of church judicatories are free to form congregational churches and be governed by majority will."[119]

(iv) Throwing open of Religious Institutions for all Followers of that Religion.

There is a wide difference in India and the United States in this respect. In the United States, the Establishment clause specifically prohibits the state from interfering with the internal affairs of church. In India there is no organised religious order. There are a very large number of sects and sub-sects within a particular religion, each of them having numerous types of institutions such as temples, maths, pathsalas and dharmashalas. They are administered by different bodies drawn from the followers of the religion

118. John Kedroff v. Saint Nicholas Cathedral of the Russian Orthodox Church in North America, 344 US 94 (1952).

119. Constitutional Limitations on State Court Review of Hierarchical Church Judicatory Decisions, 54 Col. L.Rev. 436 (1954).

concerned. Amongst the Hindus, as a matter of religious practice in the past, their institutions were open only to high-caste Hindus and not to the low-caste Hindus. In order to do away with this practice, the Constitution by article 15 prohibits discrimination on grounds of religion, race, caste etc. in regard to the use of places of public resort dedicated to the use of the general public. Again article 17 makes the enforcement of any disability arising out of untouchability an offence punishable in accordance with law.[120] Yet another article, namely article 25(2)(b), authorises the state to make laws for throwing open Hindu religious institutions of a public character to all classes and sections of Hindus. Amongst the Muslims, Christians and followers of other religions there is no such exclusion of their members from their churches or places of worship. As there was no need to provide any rule for the throwing open of religious institutions of other religions, the rule was made for Hindu religious institutions only. It has been admitted on all hands that this rule is only a step towards the goal of a general social welfare and reform.

The scope of article 25(2)(b) is wide enough. This clause saves a legislation providing for the throwing open of Hindu religious institutions to all classes of Hindus.

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120. The Parliament enacted such a law in 1955, the Untouchability (Offences) Act, 1955 (Act 22 of 1955).

Explanation II of the article says that the term Hindu includes Sikhs, Jains and Buddhists which implies that religious institutions of any of the four given religions viz., Hinduism, Sikhism, Jainism and Buddhism could be thrown open to all Hindus that is to the followers of all the four religions. In this broad sense, therefore, it is possible to open a Jain temple to all Hindus including Sikhs or a Sikh Gurudwara to all Hindus including Buddhists. This question was discussed in the Constituent Assembly. The original draft had the word "any" instead of "all" before the words "class or section of Hindus."[121] But a certain member objected to it and an amendment was, therefore, moved that the word "all" be used in place of "any", so as to include "all classes and sections of Hindus."[122] It was, contended by the member that the result would be to open religious institutions of the major religions of India to the public at large.[123] The amendment was accepted and the word

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121. Constituent Assembly Debates, VII, pp. 828-29.

122. Id., at 829.

123. Prof. K.T. Shah moving another resolution to the effect that the words Jain, Buddhist or Christian be included with Hindu in article 19(2)(b) (now article 25(2)(b)) for throwing open of their religious institutions said: "I think the intention of this clause would be served if it is more generalised, and made accessible or made applicable to all the leading religions of this country, whose religious institutions are more or less cognate, and who therefore may not see any violation of their religious freedom, or their religious exclusiveness, by having this clause about throwing open their places of worship to the public.
"I think... that... the possibility of all religious institutions being accessible and open for all communities is a very healthy sign, and would promote harmony and brotherhood amongst the peoples following various forms of beliefs in this country..."
Id., at 828.

"all" was inserted in place of "any". The Parliament enacted the Untouchability (Offences) Act, 1955, providing for the temple entry. The temple entry cases, discussed elsewhere,[124] have now settled that in so far as the Hindus, Jains, Buddhists and Sikhs are concerned, they are at liberty to exclude members of other religions from their places of worship. But within their own fold, they cannot discriminate arbitrarily. The same rule might well apply even in other types of institutions, e.g., dharamshalas, pathsalas and so on established and wholly maintained by the religious denominations.

In the United States, the Constitution does not contain any provision for the throwing open of religious institutions to all sections of the population. The Constitution actually prohibits the state, under the establishment clause, from interfering with the internal affairs of religious institutions. Segregation of the negroes and their exclusion from white churches exist even today. It was only in 1954 that segregation in public

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124. Discussed in detail, supra pp. 252-64.

schools was outlawed by the United States courts.[125] It was in 1964 that the Civil Rights Act[126] prevented discrimination in voting, in places of public accommodation and public facilities, federally secured programmes and in employment.[127] In religious institutions, such as churches, denominational schools, and other institutions, run by various religious communities, segregation still exists. In these cases the state has not taken any step so far. But it may be noted that legislation outlawing racial discrimination in other spheres has been upheld.[128] It may also be noted that legislations covertly permitting racial discrimination have been declared violative of the equal protection clause of the American Constitution.[129] This trend shows that a legislation banning racial discrimination in church-entry would also be upheld. In *Heart of Atlanta Motel v. United States*,[130] the appellant challenged the Civil Rights Act on the ground

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125. *Oliver Brown v. Board of Education of Topeka*, 347 US 483 (1954) Supp. opinion, 349 US 294 (1955), *Spottswood Thomas Bolling v. C. Melvin Sharpe*, 347 US 497 (1954).

126. 78 Stat. 241 (1964). The Act was challenged and found constitutional in *Heart of Atlanta Motel v. United States*, 379 US 241 (1964).

127. *Heart of Atlanta Motel v. United States*, 379 US 241, 252 (1964).

128. *Supra* pp. 392 and 395.

129. *Richard Perry Loving v. Virginia*, 388 US 1 (1967); *Dewey McLaughlin v. State of Florida*, 379 US 184 (1964); *Rudolph Lombard v. State of Louisiana*, 373 US 267(1963).

130. 379 US 241 (1964).

that the Act had deprived the motel to choose its customers and operate its business as it wished, resulting in taking away of its liberty and property without due process of law and without just compensation. But the United States Supreme Court unanimously declared the statute constitutional as the effect of the Act was only to prevent racial segregation in places of public accommodation. Goldberg, J., in his concurring opinion said that the primary purpose of the Civil Rights Act was the vindication of human dignity. He quoted the Senate Commerce Committee saying:

> "The primary purpose of ... (the Civil Rights Act) ... is to solve this problem, the deprivation of personal dignity that surely accompanies denials of equal access to public establishments. Discrimination is not simply dollars and cents, hamburgers and movies; it is the humiliation, frustration, and embarrassment that a person must surely feel when he is told that he is unacceptable as a member of the public because of his race or color. It is equally the inability to explain to a child that regardless of education, civility, courtesy, and morality he will be denied the right to enjoy equal treatment, even though he be a citizen of the United States and may well be called upon to lay down his life to assure this Nation continues."[151]

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151. Senate Report No. 872, 88th Congress, 2 Sess, 16; quoted in *Heart of Atlanta Motel v. United States*, 379 US 241, 291-2 (1964).

These remarks equally apply to racial discrimination in religious institutions. It can be argued that the establishment clause bars a legislation which interfere with ecclesiastical rules of church entry. But it is submitted that the equality clause[132] and the enabling section[133] of the Fourteenth Amendment gives sufficient power to the Congress to make legislations in this respect.

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132. "... nor (shall any State) deny to any person within its jurisdiction the equal protection of the laws."
Fourteenth Amendment to the United States Constitution, section 1.

133. "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."
Id., section 5.

Chapter XVIII

Conclusions

Restrictions on freedom of religion on grounds of public order, morality and health have been imposed in both the countries more or less in the same way. In the case of public order, in India, the state has wider powers than in the United States. In both the countries the state has power to curtail religious freedom in case of imminent danger to public peace. In India the state has wider power to control the apprehended breaches of peace, and for that purpose it can regulate public worship and propagation under various provisions of the law. In some cases, as for example, monogamy, American law is more strict than in India where polygamy still exists amongst the Muslims. In India the state has not yet adopted a uniform civil code prohibiting polygamy in spite of a clear directive in this behalf in the Constitution. Polygamy is not permitted at all in the United States and the courts have penalised persons having more than one wife. There is, however, little difference between the two countries so far as restrictions on grounds of health is concerned.

In the sphere of religious freedom vis-a-vis other fundamental rights article 28 of the Indian Constitution

itself provides that the latter are subject to the former. In the United States in absence of any constitutional provisions in this respect, the courts have to decide the question according to the circumstances of each case. In the case of people living in large company-owned towns the courts lean in favour of religious freedom as against the right to hold private property but in cases where the number of people living at a certain place is not very large, the claim of a private property owner is preferred to religious freedom. In India constitutional provisions prohibit discrimination on grounds only of religion, race, caste, sex, place of birth or any of them. Similarly in the United States, constitutionally no discrimination is permitted on grounds of race, colour or religion. Although separate churches exist for the white and negro Christians with separate congregations, the state does not concern with this matter. In India untouchability has been abolished by law but in practice it still continues in various forms. In the United States though there is no untouchability there is the problem of whites and non-whites. In the sphere of religious freedom of the individual and of the denominations, the law is almost the same in both the countries and the latter is given preference over the former.

As regards other restrictions on religious freedom, there is a wide difference between India and the United States. In India, while article 25(2) provides that the state may make laws regulating or restricting economic, financial, political and other secular activities and providing for social welfare and reform, in America the establishment clause of the Constitution stands in the way. It is only in some rare cases that the state in the United States interferes with the internal discipline of a religious institution. In India, various central and state enactments have made deep inroads in order to control and regulate, and in some cases, even to constitute a board for the proper management of a religious institution. Most of these enactments have been upheld by the courts of law. But in the United States interference by the state in the internal discipline of a religious institution is not it seems permissible.

It is a peculiarity of the Indian Constitution that while it guarantees religious freedom, it specifically makes provision for social welfare and reform. The initiative has already been taken to enforce monogamy and to prohibit excommunication. In the former case, however, the law does not cover the Muslims. In the latter, the Supreme Court has held that interference with the rights of the head of a community to expel a member for heresies was not

justified. It has been suggested that a universal civil code is the need of the day and monogamy should be made a rule for the Muslims also in their own interest. As to the excommunication the American courts might have taken the same view under the Watson rule[1] as was laid down in Saifuddin[2] case in India. However, due to the establishment clause of the United States Constitution, the American courts might well be justified in not interfering with the internal discipline of the Church. But it is submitted that the Indian courts are not justified in declaring a legislation prohibiting excommunication illegal.

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1. John Watson v. William A. Jones, 80 US (13 Wall) 679 (1872).

2. Sardar Syedna Taher Saifuddin Saheb v. State of Bombay, AIR 1962 SC 853.

Chapter XIX

Final Conclusions.

At the conclusion of this comparative study of religious freedom in India and the United States, the following theses are submitted, which find reasonable support in this dessertation :

(1) The secular state presupposes the separation, not always complete, of spiritual and temporal powers. The Constitutions of many modern countries embody the ideals of this separation between religion and the state. But they do not present a uniform pattern. The Constitution of the United States of America is perhaps a typical example of the doctrine of neutrality in matters of religion. The First Amendment lays down:

> "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof."

As interpreted by the American courts, this provision prohibits the state from making laws which "aid one religion, aid all religions, or prefer one religion over another."[1] The concept of secularism

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1. Arch R. Everson v. Board of Education of the Township of Ewing, 330 US 1, 15 (1947).

has also found expression in the Constitution of free India.[2] The framers of the Indian Constitution contemplated a secularism which was the product of India's own experience. Certainly they did not contemplate a state hostile to religion. In order to eliminate social injustice and oppression the state is required to take initiative in matters of social reform though touching matters of religion.

(2) The United States Constitution provides firstly non-establishment clause and secondly the guarantee of free exercise of religion. The Indian Constitution has adopted the second guarantee of free exercise of religion only. The first guarantee of non-establishment clause has not been adopted in our Constitution. Instead, the Constitution authorises through various articles the state to look to the welfare of religious institutions.

(3) Both in India and the United States taxes are not imposed on religious activities. The direct and indirect aids are constitutionally provided in India

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2. See the Preamble, and articles 25 to 30, and 44.

to religious institutions. But in the United States though direct aid has been declared invalid, indirect aids like book-aids and transportation facilities to students have been upheld. In both the countries incomes and properties of religious institutions have usually been exempted from taxes. In India by virtue of article 27 even direct aids are not unconstitutional. In the United States on account of the establishment clause not only direct aids but even indirect and exemptory aids are strictly speaking unconstitutional.

(4) As a general rule, the courts in both the countries have given a wide definition of the terms 'religion' and 'religious practices'. However, in India, the courts enter into the question whether a particular practice is both essential and integral parts of a religion. The American courts have not gone into such questions. In case a religious practice is found objectionable they find reasons to declare them unconstitutional or immoral or even opposed to public policy without enquiring as to whether it is an essential or integral part of a religion.

(5) The freedom of conscience is absolute in the United States so long as one does not act upon them in a

manner contrary to that determined by the legislator. In India, however, this freedom could be theoretically subjected to all the restrictions imposed upon religious freedom having regard to the wordings of article 25.

(6) In the United States conscientious objectors are usually allowed exemption from military service under various statutes requiring compulsory service. In India article 23(2) specifically forbids such an exemption on religious ground. Though we have not come across any case in which such an exemption was either claimed or found violative of article 23(2), it is submitted that the exemption to a conscientious objector is reasonable and article 23(2) should be suitably amended to provide for such an exemption.

(7) While there is little difference between the two countries in the matter of freedom of propagation of religious ideas the interference in other cases varies according to different circumstances. In the United States on account of the existence of the establishment clause, the state cannot constitutionally be a party to religious practices performed in schools and other public institutions. It does not, however, restrict religious observances held at private schools which do not receive aid from the state. In India,

the courts uphold only those practices which they find essential and integral parts of a religion.

(8) Untouchability has been abolished in India and all adherents of a religious denomination are entitled to worship in the religious institutions of their religion. But in the United States, segregation still exists in the case of worship in a church. The state has prohibited segregation in public transport and public places of entertainment but it has not been able to do so in the religious sphere. It is submitted that the establishment clause would not be a great hurdle if the state were to scrape away segregation in church by appropriate legislation.

(9) The Indian Constitution specifically restricts the religious freedom on various grounds. In the United States, though the Constitution guarantees religious freedom in absolute terms, the courts have upheld restrictions on grounds of public order, morality, health, and so forth. The establishment clause of the First Amendment actually restrains the state from interfering with the internal discipline of a religious institution. As such the state has little concern either with the secular activities associated with religious practices or with the economic and financial activities of the institution.

(10) When the religious freedom comes in conflict with other fundamental rights, our Constitution specifically gives preference to the latter. Though in most of the cases the result approximates with the Indian law, the American Constitution itself is silent on the point. As a consequence the American courts judge the issues according to the circumstances of each case. In doing so they have on several occasions preferred religious freedom over other rights.

(11) When the religious freedom of an individual clashes with the religious freedom of a denomination, in both the countries, the former has to give way to the latter. The excommunication cases in India, and the 'Released time' programme and Sabbath holiday cases in the United States support this view. It is submitted that from the standpoint of the establishment clause both the 'Released time' programme and recognition of Sabbath holidays are not constitutionally valid in the United States. In India since the individual freedom has to give way to the denominational authority the position, it is submitted, is not satisfactory.

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